TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 598

PEOPLE OF THE STATE OF MICHIGAN, BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONERS,

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1931

CERTIORARI GRANTED FEBRUARY 15, 1932

(36,412)

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 2051. Equity

WOOLSON SPICE COMPANY

vs.

WORDEN GROCER COMPANY

In the Matter of the Petition of the PEOPLE OF THE STATE OF MICHIGAN

BILL OF COMPLAINT—Filed February 9, 1926

To the Judges of the District Court of the United States for the Western District of Michigan, Southern Division, Sitting in Equity:

Your orator, The Woolson Spice Company, brings this, its bill of complaint, against Worden Grocery Company, defendant herein, and humbly complaining, respectfully shows unto your Honors as follows:

I

Your orator, The Woolson Spice Company, is a corporation organized and existing under the laws of the State of Ohio, with its principal office for the transaction of business in the City of Toledo, in said State of Ohio, and for a number of years last past has been and now is a citizen of the State of Ohio and a resident and inhabitant of the City of Toledo, in said State of Ohio.

II

Worden Grocer Company, defendant herein, is, and for more than twenty years last past has been, a corporation organized and existing under and by virtue of the laws of the State of Michigan, having its principal office for the transaction of business at the City of Grand Rapids in said State. During all that time it has been and now is a citizen

of the State of Michigan and a resident and inhabitant of the Southern Division of the Western District of said State of Michigan.

[fol. 2]

III

Your orator is a creditor of said defendant Worden Grocer Company upon open account. The amount of your orator's claim now unpaid is the sum of $3,344.14.

IV

The defendant, Worden Grocer Company, is now and for many years last past has been engaged in the wholesale grocery business at said City of Grand Rapids, Michigan. Its corporate Charter was about to expire in or about the month of January, 1925, but in the year 1924 and prior to the expiration of said Charter the same, by proper legal vote of its stockholders, was extended for an additional thirty years. Your orator further avers, on information and belief, that the capital stock of said Worden Grocer Company issued and outstanding is in the neighborhood of $1,200,000, of which the majority is perferred stock. Your orator further avers that said perferred stock would have matured and been payable in or about January, 1925, had it not been that many of the stockholders of said defendant Company, in the year 1924, voted to extend the maturity thereof for an additional thirty years or thereabouts. Your orator further avers, on information and belief, that certain of the preferred stockholders of Worden Grocery Company did not vote for such extension of maturity of preferred stock and did not otherwise consent thereto. Your orator avers on information and belief, that certain of said preferred stockholders who did not consent to the extension of maturity of the preferred stock held by them, have from time to time insisted that the defendant company retire the same and pay such stockholders the full par value of such stock, together with interest or dividend thereon at seven per cent annum to the date of payment; and that approximately $170,000.00 of such preferred stock which had so matured has been taken up from the former holders thereof. Your orator further avers, on information and belief, that there are other holders of preferred stock, the maturity of

which has not been extended, who are demanding payment of the par value of their stock with interest, and your orator fears that Worden Grocery Company may pay and retire such stock out of its assets instead of applying such assets to the payment of its creditors who have a prior claim thereto.

[fol. 3] V

Your orator further avers that some time ago the defendant, Worden Grocer Company, organized a subsidary corporation under the laws of Michigan, known as Worden Realty Company, and that all, or the greater part of the stock of said Worden Realty Company is owned by said Worden Grocer Company. Your orator further avers, on said information and belief, that all, or a large part of the real property of Wroden Grocer Company was by it transferred to said Worden Realty Company. Said real estate is located in the cities of Grand Rapids, Lansing, Battle Creek and Kalamazoo, in the State of Michigan. After the organization of said Worden Realty Company and its acquisition of said property, the same or the greater part thereof was mortgaged to the Grand Rapids Trust Company, of Grand Rapids, Michigan, as Trustee, to secure a bond issue of Worden Realty Company. Your orator avers, on information and belief, that the value of said real property far exceeds the amount of said mortgage and bond issue now unpaid. Said mortgage contains provisions permitting the release of parts of the property secured thereby upon the payment of sums specified therein, to said Trustee, said Worden Grocer Company is no longer occupying the property outside of the City of Grand Rapids, and such property should be disposed of at reasonable prices in excess of the amounts mentioned in said mortgage for the release thereof, so that there will be a surplus therefrom for Worden Grocer Company as stockholder of Worden Realty Company, and to be used for the benefit of the creditors of Worden Grocer Company. Your orator fears that Worden Grocer Company, as the principal or sole stockholder of Worden Realty Company, may permit said properties to be sold at less than their full value, or will permit said mortgage to become default so that said properties may be sacrificed without any surplus being derived there-

from for the benefit of the creditors of Worden Grocer Company. Said Worden Grocer Company, as is more particularly hereinafter set forth, is in an embrassed financial condition and may be unable to continue to pay rent upon the real property in Grand Rapids owned by Worden Realty Company and occupied by Worden Grocer Company, and if such default in re-tal should occur, said Worden Realty Company may not be able to make payments of interest or principal upon its said mortgage and bond issue, and fore- [fol. 4] closure may result from such default. Your orator avers that in the last financial statement available to it of Worden Grocer Company, being that of date November 30, 1924, the Worden Realty Company stock owned by Worden Grocer Company was valued at $364,150, the same being in substance the value of said real property over and above the amount of the mortgage thereon.

VI

Your orator further avers, on information and belief, that said Worden Grocer Company is indebted upon bills payable in the sum of approximately $100,000. Your orator further avers, on information and belief, that said Worden Grocer Company is indebted upon accounts payable to numerous creditors, including your orator, in the sum of approximately $300,000. Your orator further avers that in the statement of the assets and liabilities of said Worden Grocer Company, of date November 30, 1924, Worden Grocer Company valued its assets at upward of $1,275,000 more than its liabilities excluding capital stock. In such statement, however, the merchandise inventory of said Worden Grocer Company was valued at upward of $950,000 and your orator avers, on information and belief, that said inventory at present is carried at about $700,000 but that the actual value thereof is far less than the inventory value carried on the books. Your orator has been unable to obtain a copy of any audit of said Worden Grocer Company, or of any financial statement more recent than November 30, 1924. However, said Worden Grocer Company has permitted the indebtedness due your orator to remain overdue, and your orator avers, on information and belief, that there is a larger amount of other indebtedness overdue and

that all, or the greater part of the holders of bills payable of Worden Grocer Company will refuse to renew the same.

VII

Your orator avers, on information and belief, that the Worden Gorcer Company is solvent and that if its assets are properly conserved and its business completely handled, free from the interference of creditors, it will be able to pay its debts, including the indebtedness due your orator, and after the payment of the same, to pay also such preferred stock, if any, as has matured, leaving a surplus for its other stockholders. Your orator further avers that said Worden Grocery Company has within the last year or more, [fol. 5] discontinued its branches outside of the City of Grand Rapids and that its remaining business should be operated at a profit, if the same can be continued.

VIII

Your orator verily believes that the creditors of said defendant Company whose claims are due or whose claims will shortly become due, will insist on payment of the same and unless payment is made will probably commence suits therefor, which will result in judgments against Worden Grocer Company executions issued on such judgments. The failure of the Company to pay rental to Worden Realty Company will probably result in a default upon the mortgage executed by said Worden Realty Company and a foreclosure of said mortgage at great sacrifice of the property securing the same. Your orator fears that in the event of such default of rental and default of payment upon the mortgage and foreclosure, Worden Grocer Company will be deprived of its right to occupy the real property at Grand Rapids owned by Worden Realty Company, without which said Worden Grocer Company cannot be profitably operated. If suits are brought against Worden Grocer Company, or if said Company is deprived of the right to occupy said real property at Grand Rapids, or if said property of Worden Realty Company is sold at a sacrifice at foreclosure sale or otherwise, the same will result in great loss to Worden Grocer Company and will destroy the business at said company and its opportunity to dispose of its assets

in regular course at a profit, so that its creditors may be paid. Said Worden Grocer Company has, as your orator is informed and believes, a valuable property and business if it can be kept together and conserved and operated as a going concern. But if the property of said Company or of Worden Realty Company is sold at forced sale to satisfy creditors and thus sacrifice, then your orator avers that there will not be sufficient assets of Worden Grocer Company to pay its creditors. Your orator shows unto the court that the interests of the creditors of Worden Grocer Company, and those of its stockholders as well, will be best subserved if a receiver be appointed to take charge of the properties and business of Worden Grocer Company and with power to borrow moneys wherewith to operate the business thereof and to protect the right of Worden Grocer Company to occupy th real property at the city of Grand [fol. 6] Rapids owned by Worden Realty Company, and for such other purposes as may be necessary in order to avoid sacrifice and waste of the corporate assets.

IX

Your orator further avers, on information and belief, that if the assets of the Company are prudently managed by a Receiver and the loss and waste occosioned by litigation and interruption of business prevented, there will result a fund sufficient to pay the creditors of the Company, with a surplus in addition. Whereas, if the assets of the Company and its business are not so conserved, said Worden Grocer Company will become insolvent and thereby the stockholders and creditors of said Company will suffer great loss, and that the interest of said Company and its stockholders and creditors alike demand that a Receiver be appointed for the purpose of conserving its assets.

X

Your orator further avers that the amount in controversy herein exceeds the sum of $3,000, exclusive of interest and costs, and that your orator is remediless in the premises in a court of law and has no adequate remedy, except in this court of equity.

XI

Your orator therefore prays:

(a) That Worden Grocer Company, defendant herein, may answer this bill of complaint without oath, answer under oath being hereby expressly waived.

(b) That a Receiver be appointed of said Worden Grocer Company with power to take possession of all its property, assets and business, and with full power to operate, continue and manage its properties and business, and to incur indebtedness prior to the claims of general creditors in such amount as may be necessary or proper to effect the purposes of a Receivership, or any of them, and with all the usual powers of receivers in courts of equity.

(c) That the said defendant be restrained from collecting any debts due it and from paying or transferring any of its money or property, except by the order of this court and from in any manner interfering with the Receiver appointed by this court.

(d) That an accounting be had of all debts of said [fol. 7] Worden Grocer Company and that the creditors of said Company be given an opportunity by appropriate proceedings to make proof in this cause of their respective claims against said Company; that the assets of said Company be administered by this court, and that the rights of all creditors and stockholders of said Company be determined and the assets of said Company administered as equity shall require, and that after the corporate debts are paid or secured to the satisfaction of this court, the assets of said Worden Grocer Company be restored to it.

(e) That your orator may have such other or further relief as the nature of the case may require, and as shall be agreeable to equity.

XII

May it please the court to grant to your orator the writ of injunction to be issued out of and under the seal of this court directed to said Worden Grocer Company, its officers servants and agents, enjoining and restraining them from collecting or receiving any debts due it, and from selling,

assigning or transferring any of its property, or from in any way interfering with the Receiver to be appointed by this court.

XIII

May it please the court to grant unto your orator a writ of subpœna, directed to said Worden Grocer Company, commanding it to appear and answer this bill of complaint according to the rules and practice of this court.

The Woolson Spice Company, by Julius H. Amberg, Its Attorney and Agent. Julius H. Amberg, Butterfield, Kenney & Amberg, Solicitors and of Counsel for Plaintiff. Business address: Suit 503 Michigan Trust Bldg., Grand Rapids, Michigan.

[fol. 8] *Duly sworn to by Julius H. Amberg. Jurat omitted in printing.*

We, Butterfield, Kenney & Amber, hereby acknowledge ourselves security for all costs for which the plaintiff may become liable in this suit or proceeding.

Butterfield, Kenney & Amberg, by Julius H. Amberg.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT— Filed February 9, 1926

For answer to the Bill of Complaint filed in the above entitled matter, defendant, Worden Grocer Company, says:

1. That it admits each of the allegations contained in said Bill of Complaint.

[fol. 9] 2. That if consents to the appointment of a Receiver as in said Bill of Complaint prayed:

This Answer is signed and filed pursuant to a Resolution of the Board of Directors, a true copy of which is annexed hereto and marked Exhibit "A."

Worden Grocer Company, by E. D. Winchester, President. H. P. Winchester, Secretary. Travis, Merrick, Warner & Johnson, Attorneys for Defendant.

EXHIBIT "A" TO ANSWER

Whereas, a Bill of Complaint has been presented in which Bill of Complaint Woolson Spice Company is named as Plaintiff and this Company is named as Defendant, which Bill of Complaint is about to be filed in the District Court of the United States for the Western District of Michigan, and wherein the plaintiff asks for the appointment of a Receiver for this Company, and it appearing that the Company should file is Answer admitting the allegations in said Bill of Complaint and consenting to the appointment of the Receiver as therein prayed.

Be it resolved that the President or Vice President and Secretary, or either of them be and they are hereby authorized to sign the Answer of the Company, admitting the allegations contained in said Bill of Complaint, and consenting to the appointment of a Receiver as therein prayed:

Be it further resolved that Travis, Merrick, Warner & Johnson be and are hereby authorized to sign said Answer as attorneys for the Defendant and file the same and represent the Company in the above entitled proceedings.

I hereby certify that the foregoing is a true copy of a Resolution passed by the Board of Directors of Worden Grocer Company at a duly called meeting held on Februray 9, 1926.

H. P. Winchester, Secretary. (Seal.)

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER APPOINTING RECEIVER—Entered February 9, 1926, by Judge Raymond

This cause came on to be heard upon the bill of complaint filed therein and the answer of the defendant admitting the truth of the statements contained in said bill and consenting to the appointment of a Receiver, as therein prayed; and, on motion of Butterfield, Keeney & Amberg, Solicitors for plaintiff, and Travis, Merrick, Warner & Johnson, solicitors for the defendant, appearing and consenting to the

making of this order, this court doth order and decree as follows:

I

The Michigan Trust Company of Grand Rapids, Michigan, a corporation organized under the laws of the State of Michigan, is herby appointed Receiver of Worden Grocer Company, and of all its property, real, personal and mixed, wherever the same may be situated, and the said Receiver is hereby vested with all the property and rights, of every kind whatsoever, and whereseever situate, both legal and equitable, of Worden Grocer Company, and is vested with full power and authority to demand, collect, sue for and take into its possession, all the chattels, rights, credits, money and effects, lands an tenements, books, papers, choses in action, and all property, of every kind and description belonging to said Worden Grocery Company, and to collect the rents, income, profits and revenues of all said property, and to institute suits at law or in equity for the recovery of any of said assets, property or demands of the Worden Grocer Company, and to prosecute or defend any suits now pending against said Company and subject to the direction of the court, to compound and settle with any debtor or creditor of said Worden Grocer Company or with persons having possession of any of its property, or with persons in any way responsible at law or in equity to said Company upon such terms and in such manner as said Receiver shall deem just and beneficial to said Company, and in case of mutual dealings between the said defendant and other persons, to allow just set-offs in favor of such persons in all cases in which the same ought to be allowed, according to law and equity; to sell, convey and assign any and all of the personal assets of said Worden Grocer Company in the ordinary course of business; to sell, convey and assign any and all of the real estate or of other personal estate of said [fol. 11] Worden Grocer Company, subject to the supervision and order of this court to be first obtained in case the sale of said assets is not in the usual course of business; to carry on the business now carried on by Worden Grocer Company, and to operate and manage its property and business in such manner as will, in the judgment of said Receiver, produce the most satisfactory results; to maintain,

preserve and protect the said property and assets, to keep the same in proper condition and repair, so that the same may be safely and advantageously operated and used; to employ and discharge and fix the compensation of all such officers and managers and agents and employees as, in the judgment of said Receiver, shall from time to time, be needed in the performance of its duties as such Receiver, and to make such payments and disbursements as may be needful and proper in so doing; to pay the current and unpaid pay-rolls of said defendant; to incur such obligations and indebtedness as such Receiver, the same to be prior to the present unsecured obligation of said Worden Grocer Company, as to the said Receiver may seem necessary for continuance of the business of said Worden Grocer Company; to pay all taxes and assessments levied upon the property and assets of said Company and to pay all rentals or other sums which have accrued or which may hereafter accure and which may be necessary in order to enable said Worden Grocer Company to continue in the occupation of the premises now occupied by it in the City of Grand Rapids, Michigan; and to do all and singular the things which a Receiver in a court of equity has authority to do.

II

The Receiver shall take possession of all the property of said defendant Company, and the said Company, its officers, agents and employees, are hereby required to turn over and deliver to said Reciever all the goods, chattels, credits, money, lands, tenements, books, papers, choses in action, and property, of every description, real and personal belonging to said defendants; and the said defendant, its officers, servants and agents, are hereby enjoined and restrained from receiving any debts due to the said defendant, or from paying or transferring any of its effects of any kind, or from interfering with said Receiver or its operation and conduct of the business.

[fol. 12]

III

The said Receiver, before entering on its duties as such Receiver, shall give a bond in the sum of Twenty five Thousand Dollars, with surety or sureties to be approved by the clerk of this court, conditioned that it will faithfully per-

form the duties of its office and account for all moneys of properties which may come into its hands, and abide by and perform all of the orders in this court in the premises.

IV

The Receiver and the parties to this cause, and any person interested in the property or affairs of said defendant, shall have leave to apply, from time to time, to this court for further instructions in the premises, all other matters and things referred to in said bill of complaint, are reserved for the further order and decree of this Court.

Approve- for entry this 9th day of February, A. D., 1926.

Fred M. Raymond, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF THE PEOPLE OF THE STATE OF MICHIGAN—Filed Feb. 28, 1930

To the said Court:

The petition of the People of the State of Michigan by John S. Haggerty, Secretary of State of the said State of Michigan, respectfully shows unto the court as follows:

I

That on the 9th day of February, A. D., 1926, the Michigan Trust Company, a Michigan corporation, was duly [fol. 13] appointed receiver of the above named Worden Grocer Company and is now the duly qualified and acting receiver of all the assets and property of the said Worden Grocer Company.

II

That the said Worden Grocer Company is a Michigan corporation and was organized and incorporated as such on the 31st day of January, A. D., 1895, under the provisions of Act No. 232, Public Acts of 1885 of the State of Michigan, with its principal office and place of business at the City of Grand Rapids in the said State of Michigan.

III

That Section 5 of Chapter 2 of Part V of Act No. 84, Public Acts of 1921 of the State of Michigan requires that:

"Every corporation organized for pecuniary profit, • • • shall annually, in the month of July or August file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided: • • • Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. • • •"

IV

That Section 4 of Act No. 85, Public Acts of 1921 of the State of Michigan, as originally enacted, read as follows:

"Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the Secretary of State of this state, as required by section seven hereof, for the privilege of exercising its franchise and of transacting its business within this state, pay to the Secretary of State, an annual fee of three and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than fifty dollars nor more than ten thousand dollars."

[fol. 14] That the said section was amended by Act No. 233, Public Acts of 1923, so as among other things to reduce the amount of such privilege fee from three and one-half mills upon each dollar to two and one-half mills upon each dollar. That said section was again amended by Act No. 175, Public Acts of 1929, so as to add the following statement thereto:

"It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

V

That the said Worden Grocer Company is a corporation falling within the class of corporations intended to be covered by the said above cited and quoted statutes, and has ever since the enactment of the said statutes been and is now subject to and bound by the provisions thereof. Your petitioner further shows that the said Michigan Trust Company, as receiver of the said Worden Grocer Company, did from the date of its appointment as such receiver become subject to and bound by the provisions of the said above cited and quoted statutes to the same extent as they applied to and affected the said Worden Grocer Company. That notwithstanding such liability, and notwithstanding its obligation to abide by and comply with the terms and provisions of the said statutes, the said receiver has not since its appointment filed or caused to be filed the annual reports therein provided for, and has not paid or caused to be paid the annual privilege fees therein prescribed, with the exception of the report for the year ending December 31, A. D., 1925, which was tendered the Secretary of State with a filing fee of $2.00 but without the privilege fee as required by law.

VI

That the privilege fee due your petitioner from the said receiver on the basis of the report tendered for the year ending December 31, A. D., 1925, is the sum of $2,747.09, with interest thereon at the legal rate from the 1st day of September, A. D., 1926, but that your petitioner is unable to state the amounts of the privilege fees for the years ending December 31, 1926, 1927 and 1928, respectively, until [fol. 15] reports for the said years have been filed and computations made thereon. Your petitioner shows, however, that after the computation of each of the said fees, the same will bear interest from the 1st day of September of the year next following.

Your petition therefore prays that an order may be entered:

1. Requiring the said Michigan Trust Company, receiver as aforesaid, to file with the Secretary of State of the State of Michigan separate reports, supplying such information

as is required by the provisions of Act No. 84, Public Acts of 1921, as above cited and quoted, for the years ending December 31, 1926, 1927 and 1928; and that each of such reports be accompanied by a filing fee of $2.00 and by the amount of the privilege fee computed thereon, in accordance with the provisions of Act No. 85, Public Acts of 1921 of the State of Michigan as above cited and quoted.

2. That after the filing of such reports, the Secretary of State have a reasonable period of time within which to make such examination thereof as he may deem necessary or advisable, in accordance with law, for the purpose of determining the correctness of the computation of the privilege fees thereon, with leave to report to the court any error or discrepancy found therein.

3. That in the event that the receivership of the said Worden Grocer Company is not terminated prior to the 31st day of August, A. D., 1930, but is continued thereafter, said Michigan Trust Company, receiver as aforesaid, or its successor in office, file a report with the Secretary of State of the State of Michigan in accordance with the above cited and quoted acts, during the month of July or August, A. D., 1930, for the year ending December 31, A. D., 1929, and that such report be likewise accompanied by payment of the filing fee and privilege fee as required by Act No. 85, Public Acts of 1921, as aforesaid.

4. That said Receiver pay the privilege fee upon the report filed for the year ending December 31, 1925.

And your petitioner will ever pray.

People of the State of Michigan, by John S. Haggerty, Secretary of State. Wilber M. Brucker, Attorney General; Charles Rubiner, Assistant Attorney General, Attorneys for Petitioner.

[fol. 16] *Duly sworn to by John S. Haggerty. Jurat omitted in printing*

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed June 21, 1930

A petition has been filed herein by the State of Michigan asking that this court order the receiver to pay to the

proper state officer the annual corporation privilege fees provided for by Sec. 4 of Act No. 85 of the Public Acts of Michigan of 1921. The precise question presented is whether the receiver of a private corporation is liable to the state for privilege fees which accrue during the period of receivership. Examination of cases upon this subject discloses wide diversity of reasoning and opinion. So far as the question relates to corporations operating public utilities the decided weight of authority is that where the ordinary business of the corporation is continued by the receiver the franchise tax should be paid (see Central Trust [fol. 17] Co. v. New York City & N. R. Co., 110 N. Y. 250; New York Terminal Co. v. Gaus, 204 N. Y. 512; Armstrong v. Emmerson, 300 Ill. 54; Harvey v. Bay State Street Railway, 234 Mass. 336). Here the receiver urges that the state has no claim whatever for the payment of state privilege fees, the receiver having acquired nothing from the state in the way of rights, benefits and franchises for which it should be required to pay. Reliance for this position is chiefly upon the cases of U. S. v. Whitridge, 231 U. S. 134 and State of Ohio v. Harris (C. C. A. 6) 229 F. 892. It is argued that such cases as Liberty Trust Co. v. Gilliland Oil Co., 279 F. 432; Providence Engineering Corp. v. Downey Shipbuilding Corp., 8 F. (2d) 304; People v. Hopkins, 18 F. (2d) 731; and in re Malko Milling & Lighting Co., 32 F. (2d) 825, in which it was held that receivers of private corporations are liable to pay the privilege fee, are distinguishable.

Nothing is to be gained by an attempt to classify the cases upon this subject. Many of them have been analyzed and distinguished so far as possible in an annotation to the case of Armstrong v. Emmerson found in 18 A. L. R. 700. The excise tax considered in U. S. v. Whitridge (supra) was not one imposed upon the privilege of exercising the corporate franchise but upon the doing of business by the corporation. Here the tax imposed is "for the privilege" of exercising the corporate franchise. This privilege was not surrendered at any time during the taxable period.

In the case of State of Ohio v. Harris (supra) the following language is used:

"When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could

not do so if the receiver had during the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchises. Central Trust Co. v. N. Y. C. & N. R. R. Co., 110 N. Y. 250, 257, 18 N. E. 92, I. L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham."

In the present case there is no question that during the years for which it is sought to apply the privilege tax the receiver actively conducted the corporation business. The question here is whether the receiver has acquired anything from the state for which it should pay but whether the corporation whose entire assets are in the custody and [fol. 18] under the control of the receiver surrendered the privilege which is acquired from the state of exercising its franchise. The bill of complaint filed in this cause asked for the appointment of receiver with power to take possession of all the property, assets and business of the corporation and with full power to operate, continue and manage the properties and business. This was consented to by resolution of the board of directors of the corporation, the resolution being adopted on the same day on which the bill of complaint was filed. There is in the bill of complaint no averment of insolvency or indication of intent either to dissolve the corporation or to wind up its affairs. There is the clear expression of the purpose or at least the expectation that when the then present emergency had passed there would be left a surplus for the corporation. The evident purpose of the bill of complaint was to have the business of the corporation continue without interruption by creditors or others and the aid of the court was invoked to prevent such interruption by what amounted in effect to the declaring of a moratorium against creditors. For the purpose of staying the hands of creditors, the board of directors surrendered its custody and control of the property of the corporation. For all other purposes it continued. The destiny of the corporation was to a considerable extent still under its control. It might have filed a petition in bankruptcy (see Struthers Furnace Co. v. Grant, 30 F. (2d) 576). When, after several years of operation, the hope vanished that the normal corporate activities might be

resumed the board of directors might have filed a formal notice of dissolution without affecting the receivership. They probably could have filed a certificate reducing the amount of its capital stock. The indisputable fact is that the corporation retained the privilege of exercising its franchise throughout the claimed taxable period and that the receivers continued to operate the business. In this case, it is undeniable that the board of directors of the corporation and the receiver (whose appointment and activities it either sought or concurred in) continued to exercise all of the privileges of the franchise of the Worden Grocer Company. (For a discussion of the history and legal status of this class of receiverships see Scattergood et al. v. American Pipe & Construction Co., 247 Fed. Rep. 712, and Harkin v. Brundage, 276 U. S. 36.)

The general attitude of federal courts towards exactions from receivers for state and municipal revenue is indicated in the cases of In re Tyler, 149 U. S. 164, 187 and Bear [fol. 19] River Paper & Bag Co. v. City of Petoskey, 241 Fed. Rep. 53, 57.

The receiver is liable and an order may be presented for signature in accordance with the prayer of the petition.

Dated June 21, 1930.

Fred. M. Raymond, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION OF PEOPLE OF THE STATE OF MICHIGAN—Filed August 1, 1930

In this cause the petition of the people of the State of Michigan praying for an order requiring The Michigan Trust Company, receiver herein, to file certain reports with the Secretary of State of the State of Michigan and to pay certain privilege fees to the said State having been brought on for hearing; and Charles Rubiner, Assistant Attorney General, having appeared on behalf of the petitioner and Benjamin P. Merrick and Carl J. Riddering having appeared on behalf of said Receiver in opposition to the prayer of said petition but having admitted in open court the truth of the allegations of fact therein contained; and

the Court having heard the arguments of counsel and being duly advised in the premises,

It Is Hereby Ordered and Adjudged as follows:

I

On February 9, 1926, The Michigan Trust Company was duly appointed by this Court in this cause the receiver of the defendant, Worden Grocer Company, upon the plaintiff's bill of complaint and upon the defendant's answer which admitted the allegations of the bill and consented to the appointment of a receiver. Said answer and consent were authorized by the directors of the defendant by a resolution adopted on February 9, 1926.

[fol. 20]

II

At the time said receiver was appointed the defendant was a corporation existing under and subject to the provisions of Act 84 of the Public Acts of 1921 of the State of Michigan and was engaged, as it had been engaged since the year 1895, in the wholesale grocery business with principal place of business in the City of Grand Rapids, Michigan.

III

In the order appointing said receiver this Court empowered it, among other things, to carry on the business theretofore carried on by the defendant and to operate and manage the defendant's property and business in such manner as would, in the judgment of said receiver, produce the most satisfactory results. Pursuant to said order said receiver took possession of the property and assets of the defendant on February 9, 1926, and managed and operated the business continuously thenceforth until December 30, 1929, on which date this Court made an order confirming the sale of all of the mercantile assets of the defendant, effected under and pursuant to a decree of sale which had been made by this Court on November 14, 1929. Since said sale said receiver, pursuant to an order of this Court, has disbursed to the common creditors of the defendant a dividend of 25% upon their claims. At the date hereof the remaining assets in the hands of said receiver consist principally of cash and certain unsold real estate.

IV

Subsequent to its appointment said receiver tendered to the Secretary of State of the State of Michigan a report of the condition of the defendant corporation as of December 31, 1925, but said report was not accompanied by payment of the privilege fee required of corporations by Act 85 of the Public Acts of 1921 of the State of Michigan, as amended, which fee remains unpaid. Said receiver has not filed or caused to be filed with said Secretary of State any subsequent annual report setting forth the condition of the defendant corporation; and said receiver has not paid or caused to be paid to said Secretary of State any corporation privilege fee on account of the defendant corporation.

[fol. 21]

V

The provisions of Section 5 of Chapter 2 of Part V of Act 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, and the provisions of Section 4 of Act 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are applicable to, and binding upon, said The Michigan Trust Company as receiver of Worden Grocer Company, the defendant corporation.

VI

Said the Michigan Trust Company as receiver of said Worden Grocer Company shall forthwith file with the Secretary of State of the State of Michigan separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act 84 of the Public Acts of 1921, as amended, and shall pay to said Secretary of State a filing fee of Two Dollars ($2.00) for each of such reports filed pursuant hereto.

VII

Concurrently with the filing of such reports said receiver shall pay to said Secretary of State out of the funds

in its hands as such receiver, cash to the aggregate amount of the privilege fees due thereon and upon the report hitherto filed by said receiver, computed in accordance with the provisions of said Act 85 of the Public Acts of 1921, as amended, but without interest upon such privilege fees; and the petitioner by said Secretary of State may have a reasonable period of time, not exceeding thirty days from and after the filing of such reports, within which to examine the same for the purpose of determining the correctness of the computations thereof.

VIII

In the event of inability to agree upon the correct amount due in payment of said fees, either party may bring the matter before the Court for further consideration and determination.

Fred M. Raymond, District Judge.

[fol. 22] In United States District Court

Stipulation as to Fees—Filed August 8, 1930.

In the above entitled cause and matter, it is hereby stipulated and agreed by and between the petitioner and The Michigan Trust Company, Receiver of the defendant, through their respective attorneys, as follows:

1. That in lieu of the method prescribed in paragraphs VII and VIII of the order herein made and entered on August 1, 1930, for the future determination of the amount of the corporation privilege fees for which said Receiver was by said order adjudged to be liable to the State of Michigan, the amount of said privilege fees, for purposes of a final order in said matter decreeing payment thereof, is hereby determined by agreedment to be as follows:

For each of the four taxable years specified in said order, the amount of the unpaid privilege fee is $2,747.09; and For all of the years specified in said order the aggregate amount of the unpaid privilege fees is $10,988.36.

2. That on filing this stipulation and presentation thereof to the Court, either party may move ex parte for a final

order, as aforesaid, supplementing and modifying said order of August 1, 1930, in harmony with this stipulation.

3. That this stipulation is made and entered into by said Receiver without prejudice to, or waiver of, any of its rights of appeal from the final decision of said Court in said matter, provided, however, that the correctness of the computation of the amount, hereinbefore agreed upon, of the privilege fees, for the payment of which said Receiver has been adjudged liable, shall not be questioned upon appeal.

Dated August 7, 1930.

Travis, Merrick & Johnson, Attorneys for the Michigan Trust Company, Receiver. Wilber M. Brucker, Attorney General, Attorney for the People of the State of Michigan, by Charles Rubiner, Assistant Attorney General.

[fol. 23] IN UNITED STATES DISTRICT COURT

FINAL ORDER—Entered August 8, 1930, by Judge Raymond

In this cause the matter of the petition of the people of the State of Michigan came on to be further heard on this day at which time appeared Benjamin P. Merrick, one of the attorneys for The Michigan Trust Company, Receiver of the defendant, and moved for a final order in said matter; and thereupon, upon consideration thereof and of the written stipulation between the attorneys for said Receiver and for the petitioner in said matter dated August 7, 1930, and concurrently filed.

It was Ordered, Adjudged and Decreed as follows, namely:

I

The provisions of Section 5 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, and the provisions of Section 4 of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are appli-

cable to, and binding upon, said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporations.

II

Said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is in default in the filing with the Secretary of State of the State of Michigan of separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended. Said Receiver shall forthwith file said reports and shall pay to said Secretary of State a filing fee of $2.00 for each of such reports filed pursuant hereto.

III

Said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is in default in the payment, to the Secretary of the State of Michigan, of the several amounts of money specified below and hereby adjudged and finally determined to be [fol. 24] due to the State of Michigan at the date hereof, by way of corporation privilege fees on account of said defendant corporation, under the provisions of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, namely:

For the fee due and payable in July or August, 1926, the sum of	$2,747.09
For the fee due and payable in July or August, 1927, the sum of	2,747.09
For the fee due and payable in July or August, 1928, the sum of	2,747.09
For the fee due and payable in July or August, 1928, the sum of	2,747.09

Said Receiver shall forthwith pay to the Secretary of State of the State of Michigan, out of the funds in its hands as such Receiver, the sum of $10,988.36, in payment of said privilege fees, hereinabove adjudged to be due to the State of Michigan, but without interest upon said privilege fees.

IV

Insofar as the order herein made and entered on August 1, 1930 prescribed the procedure to be followed in determining the correct amount due in payment of said privilege fees, or was otherwise inconsistent with this order, it shall be deemed to be modified and superseded by this order, but shall in other respects stand confirmed.

Fred M. Raymond, District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL BY THE MICHIGAN TRUST COMPANY, RECEIVER, AND ORDER ALLOWING SAME—Filed August 8, 1930

To the Honorable Fred M. Raymond, District Judge:

The Michigan Trust Company, Receiver of the defendant in the above entitled cause, considering itself aggrieved by the order made and entered in the above entitled cause upon the eighth day of August, A. D. 1930, in the matter of the petition of the people of the State of Michigan, hereby appeals from said order for errors assigned in the accompanying assignments of error filed herewith and prays that its appeal may be allowed; that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was made, may be made and duly authenticated and sent to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio.

Your Petitioner further prays that the proper order be made relating to the security to be required of it on appeal.

And your Petitioner will ever pray, etc.

Dated August 8, 1930.

The Michigan Trust Company, Receiver of Worden Grocer Company, by Benjamin P. Merrick, One of Its Attorneys. Benjamin P. Merrick, Travis, Merrick & Johnson, Attorneys for the Michigan Trust Company, Receiver.

It is ordered that the appeal be allowed as prayed for; that the appeal bond be fixed at the sum of Five Hundred Dollars ($500); and that the bond submitted and approved, be filed herein.

Dated August 8, 1930.

Fred M. Raymond, District Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed August 8, 1930

Now comes the appellant, The Michigan Trust Company, Receiver of the defendant in the above entitled cause, by Benjamin P. Merrick and Travis, Merrick & Johnson, its attorneys, and, in connection with its petition for appeal, says that in the record and proceedings in this cause in the matter of the petition of the people of the State of Michigan, and in the order made and entered therein on the eighth day of August, A. D. 1930, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The Court erred in decreeing, by said order, that the provisions of Section 5 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, are applicable to and binding upon said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation.

2. The Court erred in decreeing, by said order, that the provisions of Section 4 of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are applicable to and binding upon said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation.

3. The Court erred in decreeing, by said order, that said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is under a legal duty to file with the Secretary of State of the State

of Michigan separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, and in decreeing that said Receiver shall forthwith file said reports.

4. The Court erred in decreeing, by said order, that said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is under a legal duty to pay to the State of Michigan corporation privilege fees for the years 1926, 1927, 1928 and 1929, or [fol. 27] any of them, on account of the defendant corporation, under the provisions of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, and in decreeing that said Receiver shall forthwith pay said privilege fees to the Secretary of State of the State of Michigan out of the funds in the hands of said Receiver.

5. The Court erred in not holding and decreeing that, by reason of the admitted non-payment by the defendant corporation of the privilege fee which became due and payable by it in July or August, 1926, and by force of the provisions of Section 6 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, the corporate powers of the defendant corporation were suspended from and after September 10, 1926, and that in consequence of such suspension of powers the statutory obligation of the defendant corporation to file annual reports thereafter was likewise suspended and nullified.

6. The Court erred in not holding and decreeing that, by reason of the admitted neglect of the defendant corporation for two consecutive years, namely, 1926 and 1927, to file the annual report and to pay the annual privilege fee, as required by the statutes of the State of Michigan, the charter of the defendant corporation, by force of the provisions of Act No. 172 of the Public Acts of 1923 of the State of Michigan, became void on, to-wit, August 31, 1927, and that in consequence thereof neither the defendant corporation nor its Receiver was thereafter under any legal duty to file any subsequent annual report or to pay any subsequent privilege fee to the State of Michigan under the provisions of Act No. 84 and Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended.

7. That the Court erred in not holding and decreeing that, by reason of the admitted neglect of the defendant corporation for two consecutive years, namely, 1927 and 1928, to file the annual report and to pay the annual privilege fee, as required by the statutes of the State of Michigan, the charter of the defendant corporation, by force of the provisions of Act No. 267 of the Public Acts of 1929 of the State of Michigan, effective August 27, 1929, (amendatory of Section 7 of Chapter 2 of Part V of Act No. 84 [fols. 28 & 29] of the Public Acts of 1921, as amended) became absolutely void without any judicial proceeding whatsoever on the date said Act No. 267 of the Public Acts of 1929 took effect, to-wit, August 27, 1929, and that in consequence thereof neither the defendant corporation nor its Receiver was under any legal duty to file the annual report or to pay the privilege fee not finally due until August 31, 1929.

Wherefore the appellant prays that the District Court of the United States for the Western District of Michigan, Southern Division, in Equity, may be directed to reverse its decree and judgment in the herein-mentioned particulars, with such further orders as Equity demands.

Dated August 8, 1930.

Benjamin P. Merrick, Travis, Merrick & Johnson,
Attorneys for Appellant.

Bond on appeal for $500.00, approved and filed August 8, 1930, omitted in printing.

[fol. 30] Citation, in usual form, showing service on Wilber Brucker, filed August 16, 1930, omitted in printing.

[fol. 31] In United States District Court

Praecipe—Filed August 18, 1930

To the Clerk of said Court:

Please Take Notice that you are requested to include in your return to the Circuit Court of Appeals for the Sixth

Circuit, upon the appeal of The Michigan Trust Company, Receiver of Worden Grocer Company, the defendant in the above entitled cause, in the matter of the petition of the People of the State of Michigan, the following papers, namely:

1. Bill of Complaint.
2. Answer of defendant.
3. Order appointing Receiver.
4. Petition of the People of the State of Michigan.
5. Opinion of Court dated June 21, 1930.
6. Order of Court dated August 1, 1930.
7. Stipulation dated August 7, 1930.
8. Final Order of Court dated August 8, 1930.
9. Petition for Appeal, and Order of Allowance.
10. Assignments of Error.
11. Bond on Appeal.
12. Citation.
13. Praecipe.
14. Clerk's Certificate.

Dated: August 8, 1930.

Yours, etc., Travis, Merrick & Johnson, Attorneys for Appellant.

Due and personal service of the within praecipe is hereby acknowledged and I join therein.

Wilber M. Brucker, Attorney General, Attorney for the People of the State of Michigan, by Charles Rubiner, Assistant Attorney General.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed August 27, 1930)

J. W. MENZIES,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

BENJAMIN P. MERRICK,
TRAVIS, MERRICK & JOHNSON
of Counsel

CAUSE ARGUED AND SUBMITTED

(January 9, 1931—Before: DENISON, HICKS and HICKENLOOPER, JJ.)

This cause is argued by B. P. Merrick for Appellant and by Charles Rubiner for Appellee and is submitted to the court.

JUDGMENT

(Filed October 8, 1931)

Appeal from the District Court of the United States for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this court.

OPINION

(Filed October 8, 1931)

Before DENISON, HICKS and HICKENLOOPER, Circuit Judges.

HICKENLOOPER, Circuit Judge: On February 9, 1926, appellant was appointed receiver for the Worden Grocer Company, a Michigan corporation, and operated the business under orders of the court until December 30, 1929, at which time all mercantile assets were sold. The only question presented upon this appeal is whether during this period of operation the receiver became obligated, annually, to pay the so-called Michigan Franchise Tax, for or on behalf of the Worden Grocer Company, which taxes had not been assessed at the time of the appointment of the receiver but were subsequently levied "for the privilege of exercising its franchise and of transacting its business within this state." Section 4, Act No. 85, Public Acts of 1921.

Although measured by the amount of the corporation's "paid-up capital and surplus", the tax is obviously not a tax upon the property of the corporation, but an excise tax upon the privilege of doing business in corporate form. *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *in re Detroit Properties Corp., et al.*,—Mich.—(decided June 1, 1931), 236 N. W. 850. In the decision last cited practically all of the authorities upon our main issue are collected, and it would seem useless to review them here in detail, although we shall, of course, refer to many, and shall express our views as to their proper classification.

In re Detroit Properties Corporation also recognizes that a proper decision of this issue depends upon whether the receiver, by operating the business, exercised or used any of the franchises of the corporation.[1] This is mani-

[1] No question of the construction of a state statute by the highest court of the state was there or is here involved. We do not therefore consider whether it is within the power of the state to levy a tax upon the receivers of the property of private corporations, measured by the amount of the outstanding capital and surplus, but without regard to the exercise by the receiver of any of the franchises of the corporation, or whether such a tax would be valid as to those receivers appointed by a federal court, as distinguished from those appointed by the state courts.

festly the proper criterion to apply. If he did, liability to the tax would be the liability of the receiver and the fee must be paid by him. If he did not use any of the franchises of the corporation, it is extremely difficult, if not impossible, to justify the imposition of a tax against the receiver, as such. It is true that the corporation itself might remain liable to an annual tax upon the franchise "to be" a corporation, or even upon the franchise "to do" business in corporate form, until the corporation was actually dissolved, a distinction given much weight by the Supreme Court of Michigan, but the receiver takes the property charged only with the debts and liabilities of the corporation, liquidated or unliquidated, which exist at the time of his appointment. It would be immaterial in every case whether the corporation might be held independently liable for taxes thereafter accruing, except and unless the properties or some part thereof were subsequently returned to it or a surplus was distributable to stockholders. Otherwise there would be nothing from which the tax could be paid. The corporation would be but an empty shell.

Relying upon the supposed distinction between a tax upon the "privilege" of exercising the franchise "to do", and a tax upon the franchise "to be", the opinion in *In re Detroit Properties Corporation* concludes that inasmuch as a receiver normally may conduct only such business as the corporation was theretofore authorized by charter to transact, such receiver is exercising the corporation's franchise "to do." Compare, also, *In the Matter of George Mather's Sons Co.*, 52 N. J. Eq. 607. This would seem a *non sequitur* where the corporation had been engaged in purely mercantile pursuits "for franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right." *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595. A receiver "is a mere arm of the court appointing him." *Converse* v. *Hamilton,* 224 U. S. 243, 257. "Immediately upon such appointment and after qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature." *Atlantic*

Trust Co. v. *Chapman,* 208 U. S. 360, 370; *Booth* v. *Clark,* 17 How. 322, 331. Not only, in the case of mercantile corporations, is the franchise "to do" inseparable from the franchise "to be", and necessarily implied from a grant of the latter franchise, and the distinction therefore somewhat vague, but no good reason appears in such a case why the receiver may not perform, under direction of the court, any act which might be performed by any other citizen, in total disregard of the corporate capacity of the former possessor of the property, and without any reliance whatever upon its franchises. The property is no longer under the control of the corporation. The court and the receiver need no grant from the state of "special privileges" to effect a disposition of such property in accordance with the rules of law and equity. The limitation that the receiver may normally transact only such business as is authorized by the corporate charter, arises from the implied contract between the corporation and its stockholders that the money invested shall be used only for such purposes, not from any dependence by the court upon the grant of the powers enumerated by the charter.

The suggested distinction is well enough in the case of a public utility. "No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived." *California* v. *Pacific R. Co.,* 127 U. S. 1, 40. Such a franchise is not included in the simple grant under general laws of the right to be a corporation. It is separate and apart from the franchise "to be". Thus, when a receiver is appointed for such public utility, and such receiver proceeds to operate the business, in a very accurate sense he is using the franchise "to do" formerly exercised by the corporation. This is quite plainly suggested by some of the decisions involving railroad or other public utility receiverships. *Collector of Taxes* v. *Bay State St. Ry.,* 234 Mass. 336; *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512, 516; *Armstrong, Receiver,* v. *Emmerson, Sec'ty of State,* 300 Ill. 54; *Phila. & R. R. Co.* v. *Commonwealth,* 104 Pa. St. 80. It is the proper ground, we think, upon which other similar cases should have been decided, al-

though both groups are often rather loosely cited as authority for the proposition that a franchise tax is payable wherever the receiver continues to operate the business, regardless of its nature. Compare: *Bright* v. *Arkansas*, 249 Fed. 950 (C. C. A. 8); *State* v. *Bradley*, 207 Ala. 677; *Central Trust Co.* v. *N. Y. C. & N. R. Co.*, 110 N. Y. 250.

Several other lines of authority, clearly distinguishable in principle, are also relied upon by the appellee. In *McFarland* v. *Hurley*, 286 Fed. 365 (C. C. A. 5) and *Liberty Central Trust Co.* v. *Gilliland Oil Co.*, 279 Fed. 432 (D. C., La.), corporation franchise taxes, as such, were not involved. An oil severance tax was imposed by statute. Obviously, if the severance be made by a receiver, such receiver is directly and primarily liable for the payment of the tax. The question here presented was not there involved. *In U. S. Car Co. Case*, 60 N. J. Eq. 514, the corporation is held bound to perform the statutory conditions as long as it remains in possession of the privilege. "The sole test * * * is the existence or nonexistence of the corporation." No consideration whatever is there given to whether the assessment is properly against, and collectible from, the receiver, or whether it should more properly be against the corporation and collectible only if and when such corporation again comes into the possession and control of its property. *Duryea* v. *American Wood Working Mach. Co.*, 133 Fed. 329 (C. C., N. J.) and *Conklin* v. *U. S. Shipbuilding Co.*, 148 Fed. 129 (C. C., N. J.) add nothing to our knowledge of this subject. No reasons beyond citing the *U. S. Car Co. Case* are given.

Several cases of mercantile corporation receiverships boldly announce the broad rule that the franchise tax is payable by the receiver whenever he continues to operate the business. *Savings Co. v. Motor Co.*, 116 O. S. 95, 101; *People* v. *Hopkins*, 18 F. (2d) 731 (C. C. A. 2); *Ohio* v. *Harris*, 229 Fed. 892 (dictum) (C. C. A. 6). These cases, we think, are the result of blindly following an apparent mass of precedent (often inaccurately thought out and expressed) without careful analysis of the facts of such cases, or a determination of the sound-

ness of reason underlying the decision in each. We feel under no obligation to follow this lead.

In cases in bankruptcy, although this is generally said to be by virtue of §64 of the Bankruptcy Act (11 U. S. C. §104), franchise taxes which had not accrued at the time of filing the petition are not thereafter collectible from the receiver. *N. J.* v. *Anderson,* 203 U. S. 483; *N. Y.* v. *Jersawit,* 263 U. S. 493; *Bates* v. *Archer,* 288 Fed. 182 (C. C. A. 6). These cases impliedly recognize a limitation upon the right of the State to tax a franchise which is not in present enjoyment. So, also, where the receiver does not operate the business, or is appointed in proceedings to dissolve an insolvent corporation, or an injunction has issued against the corporation, restraining the further transaction of business by it, the same rule is applied. *Ohio* v. *Harris, supra; Commonwealth* v. *Lancaster Savings Bank,* 123 Mass. 493, 496; *Johnson* v. *Johnson Bros.,* 108 Me. 272; *State* v. *Bradford Savings Bank,* 71 Vt. 234; *Greenfield Savings Bank* v. *Commonwealth,* 211 Mass. 207. But we fail to see the controlling effect of the nature of the proceeding upon the question of whether the receiver is in fact using, or is not using, any of the franchises of the corporation.

Finally, upon the subject of whether receivers of mercantile corporations do exercise the corporate franchises, the language of the Supreme Court in *United States* v. *Whitridge,* 231 U. S. 144, 149, seems to us controlling: "True, they [the receivers] may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges." We conclude that here, also, the receiver cannot be said to have used or exercised any of the corporate franchises.

It is contended of this decision, as shown by the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, that under the federal Corporation Tax Law of 1909 the tax was imposed, not upon the franchises of the corporation irrespective of their use in business, but upon the actual doing of corporate business with all the advantages that inhere in such organizations; while here the tax is upon "the privilege" of engaging in such business. This is a distinction without a difference so far as regards a continuance of the existence of the "privilege" to do business. If the right or privilege to continue its corporate business is terminated or lost, and the receiver is not exercising that franchise, but rather powers otherwise acquired, there is no foundation upon which the tax may operate; and to all practical intents and purposes the corporation which has been shorn of all its property and facilities by a receivership has, for the period of the receivership, been ousted of its *privilege* to do business in corporate form, as well as of the actual conduct of its business, as completely as if an injunction had issued or the corporation had been placed in dissolution. *Ohio* v. *Harris, supra.* Thus the rationale of the decision in *United States* v. *Whitridge, supra,* applies in all its force to the present case.

The dictum in *Ohio* v. *Harris, supra,* is disapproved, the decree of the District Court is reversed, and the cause is remanded for further proceedings. Should it appear that a surplus over indebtedness was payable by the receiver to stockholders, for and on account of their stock holdings, such fund would be chargeable with the claim of the State for franchise taxes, for, to this end alone, the corporate existence must be regarded as continued for the stockholders' benefit. But the State may share in the distribution of assets only if and after other creditors and the expenses of the receivership are paid in full. The holders of such claims neither had nor now have any possible interest in the preservation of the franchise. As to them the claim of the State is without that equity which would exist were the stockholders to benefit.

Reversed and remanded.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Michigan Trust Company, Receiver, etc.*, v. *The People of the State of Michigan*, No. 5745, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 12th day of November, A. D. 1931.

J. W. MENZIES,
[SEAL] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed February 15, 1932.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,412. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 598. People of the State of Michigan, by John S. Haggerty, Secretary of State, petitioners, vs. Michigan Trust Company, receiver of Worden Grocer Company. Petition for a writ of certiorari and exhibit thereto. Filed December 28, 1931. File No. 36,412.

FILE COPY

FILED

DEC 28 1931

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 598

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL W. VOORHIES,
Attorney General of the State of Michigan;
EDWARD A. BILITZKE,
Assistant Attorney General,
Counsel for Petitioner.

(36,412)

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931

No. 598

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your Petitioner respectfully shows to this Honorable Court:

A.

Summary Statement of Matters Involved.

The Woolson Spice Company, an Ohio Corporation, on February 9, 1926, petitioned the District Court of the United States, Western District of Michigan, for the appointment of a receiver for the Worden Grocer Company, a Michigan Corporation, engaged in the wholesale grocery business (R. 2), alleging that the Worden Grocer Company was indebted to it in the sum of $3,344.14 (R. 2); that the Worden Grocer Company was then engaging in the real estate business through a subsidiary company known as the Worden Realty Company (R. 3); that because preferred stock-

holders of the Worden Grocer Company were demanding payment of their stock, and by reason of the inability of the Realty Company to retire the mortgage given at the time a bond issue was floated by the Realty Company, the petitioner, the Woolson Spice Company, feared that its account would not be paid (R. 3). It alleged that while the grocery company was solvent (R. 4) it feared the business would suffer, because of threatened suits to force the payment of other claims, and by reason of the foreclosure of said mortgage (R. 5); that the interests of the creditors and stockholders would be "best subserved if a receiver be appointed to take charge of the properties and business of the Worden Grocer Company, and with power to borrow moneys wherewith to operate the business thereof, and to protect the right of the Worden Grocer Company to occupy the real property at the City of Grand Rapids, owned by Worden Realty Company, and for such other purposes as may be necessary in order to avoid sacrifice and waste of the corporate assets" (R. 6). It prayed that the receiver "continue and manage its properties and business," etc., and "that after the corporate debts are paid or secured to the satisfaction of this (District) court, the assets of said grocery company be restored to it" (R. 7). By resolution the grocery company consented to the appointment of a receiver (R. 9). The order appointing the receiver, made February 9, 1926, authorized the receiver "to carry on the business now carried on by Worden Grocer Company" (R. 11).

Thereafter, on February 28, 1930, the petitioner herein, in behalf of the People of the State of Michigan,

petitioned said District Court (R. 12) for an order compelling the receiver to file annual reports with him as Secretary of State, and to pay to him, as Secretary of State, the corporation privilege tax for the years 1926, 1927, 1928, and 1929, stipulated by counsel to amount to $10,988.26 (R. 22 and 24). Said privilege tax being imposed by Acts 84 and 85 of the Public Acts of 1921 (R. 13).

On August 1, 1930, the District Court, through Judge Raymond, granted the prayer of said petition and ordered the payment of said privilege tax (R. 19). It appears from the order of this Court that the assets of the grocery company were sold on December 30, 1929 (R. 20); that the receiver has paid a 25 per cent dividend to the common creditors (R. 20). No part of said tax has been paid.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment of the lower court was, on October 8, 1931, reversed, the court holding that the assets in the hands of the receiver should not be chargeable with this tax; that "should it appear that a surplus over indebtedness was payable by the receiver to stockholders, for and on account of their stock holdings, such fund would be chargeable with the claim of the State for franchise taxes" (R. 39).

B.

Reasons Relied on for the Allowance of the Writ.

I.

The decision of the said Circuit Court of Appeals as to the liability of the receiver for the payment of the

corporate privilege tax, maturing during the period of the receivership and before the dissolution of the corporation, is in conflict with the following decisions of the Circuit Courts of Appeals:

People v. *Hopkins*, 18 Federal Reporter, 2nd Series, 733;

Bright et al. v. *State of Arkansas*, 249 Fed. Rep. 950;

Bright et al. v. *State of Arkansas*, 249 Fed. Rep. 953;

McFarland et al. v. *Hurley et al.*, 286 Fed. Rep. 365;

Ohio v. *Harris*, 229 Fed. Rep. 892.

II.

That the decision of the Circuit Court of Appeals in the instant case is a decision of an important question of local law, involving the right to collect taxes imposed under the laws of the State of Michigan, and said decision is in conflict with an applicable local decision of the Supreme Court of the State of Michigan. That the Supreme Court of Michigan, on June 1, 1931, in the case *In Re Detroit Properties Corporation*, 254 Mich. 524, where the facts showed that the receiver had been appointed to "continue the business of the corporation" held that the corporation privilege tax must be paid by the receiver. The issue and facts in the case before the Circuit Court of Appeals, sought to be reviewed in this court, are identical with the issue and facts in the case before the Supreme Court of Michigan. (Full text of opinion of Michigan Supreme

Court attached to Brief accompanying this petition, and marked "Schedule A".) (Page 32.)

III.

The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the weight of authority. That this exact question has been before District Courts of the United States who have held without exception that such tax was payable where the receiver carried on the business of the corporation. The following are citations of the opinions of District Courts:

Conklin v. *United States Shipbuilding Co.*, 148 Fed. Rep. 129;

Duryea v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329;

Coy v. *Title Guarantee & Trust Co.*, 212 Fed. Rep. 520.

The Circuit Court of Appeals in its decision in the instant case, admits the conflict of authority, by calling attention to the cases decided by the other Circuit Courts of Appeals, but dismisses them with the statement that they were not sound in reason and for that reason felt they were under no obligation to follow them (R. 37). The District Court of the United States, in its decision in the instant case (R. 16) calls attention that the weight of authority sustains the payment of the tax under the facts in this case. For discussion as to the weight of authority, see *Bright* v. *State of Arkansas*, 249 Federal Reporter 950.

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IV.

That by reason of the conflict between the decision of the Circuit Court of Appeals in the instant case, and the Michigan Supreme Court, and the decision of other Circuit Courts of Appeals, a state of confusion prevails in the administration of the law imposing a privilege tax on corporations in the State of Michigan. That the Circuit Court of Appeals has decided an important question of local law in conflict with an applicable local decision. That by reason of the conflict of decisions, a receiver appointed by a Federal Court in Michigan, could not be required to pay the corporate privilege tax, whereas a receiver appointed by a State Court in Michigan, would be required to pay the corporate privilege tax.

V.

That the liability of a receiver, appointed by the District Court of the United States, to pay a corporation privilege tax imposed by the laws of the State of Michigan, said tax maturing during the period of the receivership and prior to the dissolution of the corporation, has never been determined by this Court; that it is an important question of Federal law, and of local law, and directly involves the collection of a substantial amount of state taxes and should be settled by the decision of this Court.

VI.

That the judgment of the Circuit Court of Appeals in the instant case, should be reversed, and the judgment of the District Court of the United States be affirmed.

WHEREFORE your Petitioner prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify to and send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case, numbered and entitled on its Docket, No. 5745, Michigan Trust Company, Receiver of Worden Grocer Company, Appellant, vs. People of the State of Michigan, by John S. Haggerty, Secretary of State, Appellee, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and the judgment of the District Court of the Western District of Michigan be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

PEOPLE OF THE STATE OF MICHIGAN,
By JOHN S. HAGGERTY,
Secretary of State,
By PAUL W. VOORHIES,
Attorney General.

PAUL W. VOORHIES,
Attorney General for the State of Michigan,
EDWARD A. BILITZKE,
Assistant Attorney General,
Attorneys for Petitioner.

Business address: The Capitol, Lansing, Michigan.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 598

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the District Court of the United States, Western District of Michigan, is shown on page 16 of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 52 Federal Reporter 842. (See also R. 34.)

II.

Jurisdiction.

(1) Application for Writ of Certiorari to review the judgment of the Circuit Court of Appeals is made pursuant to Section 240 of the Judicial Code as amended by Act of February 13, 1925. 27 U. S. Code Ann., Sec. 347.

For reasons relied upon for allowance of Writ, see page 3 of the Petition for Writ of Certiorari.

(2) The date of the judgment to be reversed is October 8, 1931 (R. 33).

(3) The decision of the said Circuit Court of Appeals as to the liability of the receiver for the payment of the corporate privilege tax, maturing during the period of the receivership and before the dissolution of the corporation, is in conflict with the following decisions of the Circuit Court of Appeals:

People v. *Hopkins,* 18 Federal Reporter, 2nd Series, 733;

Bright et al. v. *State of Arkansas,* 249 Fed. Rep. 950;

Bright et al. v. *State of Arkansas,* 249 Fed. Rep. 953;

McFarland et al. v. *Hurley et al.,* 286 Fed. Rep. 365;

Ohio v. *Harris,* 229 Fed. Rep. 892.

(4) That the decision of the Circuit Court of Appeals in the instant case, is a decision of an important question of local law, involving the right to collect

taxes imposed under the laws of the State of Michigan, and said decision is in conflict with an applicable local decision of the Supreme Court of Michigan. That the Supreme Court of Michigan on June 1, 1931, in the case *In re: Detroit Properties Corporation*, 254 Mich. 524, where the facts showed that the receiver had been appointed to "continue the business of the corporation" held that the corporation privilege tax must be paid by the receiver. The issue and facts in the case before the Circuit Court of Appeals, sought to be reviewed in this Court, are identical with the issue and facts in the case before the Supreme Court of Michigan. (Full text of opinion of Michigan Supreme Court attached hereto, and marked "Schedule A") (page 32).

(5) The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the weight of authority. That this exact question has been before District Courts of the United States who have held without exception that such tax was payable where the receiver carried on the business of the corporation. The following are citations of the opinions of District Courts:

Conklin v. *United States Shipbuilding Co.*, 148 Fed. Rep. 129;

Duryea v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329;

Coy v. *Title Guarantee & Trust Co.*, 212 Fed. Rep. 520.

(6) The Circuit Court of Appeals in its decision in the instant case, admits the conflict of authority, by

calling attention to the cases decided by the other Circuit Courts of Appeals, but dismisses them with the statement that they were not sound in reason and for that reason felt they were under no obligation to follow them (R. 37). The District Court of the United States, in its decision in the instant case (R. 16) calls attention to the weight of authority and sustains the payment of the tax under the facts in this case. For discussion as to the weight of authority, see *Bright* v. *State of Arkansas*, 249 Federal Reporter, 950.

(7) That by reason of the conflict between the decision of the Circuit Court of Appeals in the instant case, and the Michigan Supreme Court, and the decision of other Circuit Courts of Appeals, a state of confusion prevails in the administration of the law imposing a privilege tax on corporations in the State of Michigan. That the Circuit Court of Appeals has decided an important question of local law in conflict with an applicable local decision. That by reason of the conflict of decisions, a receiver appointed by a Federal Court in Michigan, could not be required to pay the corporate privilege tax, whereas a receiver appointed by a State Court in Michigan, would be required to pay the corporate privilege tax.

(8) That the liability of a receiver, appointed by the District Court of the United States, to pay a corporation privilege tax imposed by the laws of the State of Michigan, said tax maturing during the period of the receivership and prior to the dissolution of the corporation, has never been determined by this Court; that it is an important question of Federal law, and

of local law, and directly involves the collection of a substantial amount of State taxes and should be settled by the decision of this Court.

The following cases sustain the jurisdiction of this Court to grant a Writ of Certiorari in the instant case:

Keller v. *Adams-Campbell Co.*, 264 U. S. 314, 68 L. Ed. 705, 44 Sup. Ct. 356;

Magnum Import Co. v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531;

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, 43 Sup. Ct. 422;

Forsyth v. *City of Hammond*, 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. 665, rev'g decree, 71 Fed. 443;

Webster Elec. Co. v. *Splitdorf Electrical Co.*, 264 U. S. 463, 68 L. Ed. 792, 44 Sup. Ct.

III.

Statement of the Case.

Full detailed statement of the case has been given under subdivision "A" in the petition for Writ of Certiorari (page 1 of Petition), and is therefore omitted from this brief. However, the question for determination is the correctness of the opinion of the Circuit Court of Appeals holding that a receiver, appointed to carry on the business of a solvent corporation, by and with the consent of the directors of the corporation, should not be chargeable with the corporation privilege tax imposed by the State of Michigan, the said tax maturing during the period of the

receivership. The Circuit Court of Appeals holding that any surplus in the hands of the receiver, after other creditors and the expenses incurred by the receiver have been paid, should be chargeable with the claim of the State for such franchise taxes (R. 39).

It is the contention of the Petitioner that this decision of the Circuit Court of Appeals announces a new rule of law regarding the payment of taxes by a receiver, without precedent either in the way of court decisions or treatise, and is contrary to the weight of authority. That inasmuch as that court has held that such tax is payable out of any funds available for the stockholders, it thereby establishes the rule that the corporate existence is continued, and because the corporate existence is continued, under the decisions of the Supreme Court of Michigan, the corporate privilege tax is payable.

Not only is the decision of the Circuit Court of Appeals in direct conflict with the decision of the Michigan Supreme Court (*In re Detroit Properties Corp.*, 254 Mich. 525), but the decision is contrary to the decision of other Circuit Courts of Appeals and other District Courts heretofore cited.

That the corporate privilege tax in Michigan has been held to be payable by a corporation organized under the laws of Michigan, regardless of whether the corporation does any business within the State. See *In Re G. H. Hammond Company*, 246 Mich. 182. It is the contention of the Petitioner that because the receiver was appointed to carry on the business of a corporation that was not insolvent and whose term of existence had not been terminated, that the court should

order the payment of this tax the same as it ordered the payment of taxes upon real estate, personal property, etc.

IV.

Specifications of Errors.

1. That the Circuit Court of Appeals erred in holding that the judgment of the District Court should be reversed.

2. That the court erred in holding that the corporate privilege tax, which accrued after the receiver was appointed, was not an obligation which the receiver should be required to pay.

3. That the court erred in holding that said privilege tax is payable only when it appears that a surplus over indebtedness was payable by the receiver to stockholders, on the theory that the corporate existence can only be regarded as continued for the benefit of the stockholders.

V.

ARGUMENT.

Michigan Statutes Involved.

The privilege fees here claimed are imposed by the State of Michigan pursuant to the provisions of Section 5, Chapter 2, Part V, Act 84, P. A. 1921 (Sec. 10127 of Compiled Laws of 1929), the relevant portion of which reads as follows:

> "'Every corporation organized for pecuniary profit, * * * shall annually, in the month of

July or August, file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided; * * * Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. The secretary of state is hereby authorized to require of any corporation any additional information that may be needed after the filing of its annual report for the purpose of computing such fee. * * * Such reports shall be * * * deposited in the office of the secretary of state within the said month of July or August accompanied by a filing fee of two dollars, and the amount of the annual franchise fee provided by law: * * *"

(This section amended in respects not relevant to these issues, by Act No. 72, Public Acts of 1927), and pursuant to Section 4 of Act No. 85, Public Acts of 1921 (Sec. 10140 of Compiled Laws of 1929) which, as originally enacted, read as follows:

"Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by section seven hereof, *for the privilege of exercising its franchise and of transacting its business within this state*, pay to the secretary of state, an annual fee of three and one-half mills upon each dollar of its paid-up

capital and surplus, but such privilege fee shall in no case be less than fifty dollars nor more than ten thousand dollars."

This section was amended by Act No. 233, Public Acts of 1923, among other things to reduce the amount of the privilege fee from three and one-half mills upon each dollar to two and one-half mills. The same was again amended by Act No. 175, Public Acts of 1929, with the following statement added:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Fundamental Reasoning of the Supreme Court of Michigan in re: Detroit Properties Corporation, 254 Mich. 525.

The issue before the Supreme Court of Michigan was identical with the issue before the Circuit Court of Appeals in the instant case. The Supreme Court of Michigan states the issue as follows:

> "The issue is whether the corporation is subject to the privilege fee which, by 2 Comp. Laws 1929, Sec. 10140, every domestic corporation is required to pay 'for the privilege of exercising its franchise and of transacting its business within this State', and which accrued after the appointment of the receiver and its taking control of the corporate property and business. * * *"

The Court found:

1. That the privilege tax imposed by the Statutes of Michigan is required to be paid—

> "For the privilege of exercising its franchise and of transacting its business in Michigan."

That actual transaction of business by a corporation is not a condition of the tax. It will be noted that the Statutes imposing such tax (Sec. 10140 of the Comp. Laws of Mich. 1929) reads:

> "* * * It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this State, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The part of the statute just quoted was added to the Corporate Privilege Tax Law by an amendment in 1929, which became effective May 20, 1929. The privilege taxes herein sought are for the years 1926, 1927, 1928 and 1929. The Supreme Court of Michigan had, previous to said amendment, construed the Corporate Privilege Tax Law as originally enacted so as to require the payment of said tax in any case where a corporation was "organized" under the laws of Michigan; and for that reason the amendment in 1929 did not change the law as it was then being administered in Michigan.

The Supreme Court of Michigan *In re G. H. Hammond Company*, 246 Mich. 182, said—

"* * * It is apparent from the context of the statute itself that this provision was intended to apply to every corporation *organized* under the laws of this State. * * *"

"Michigan has seen fit to adopt legislation by which the annual privilege fee is imposed upon a corporation organized under its laws regardless of whether the corporation does any business within the State. * * *"

2. That in all cases cited or found, where the power to impose a similar tax during receivership has been denied, it appeared that the corporation was insolvent or in process of liquidation, or had been prohibited by law or injunction from exercising its franchise, or the proceedings were for dissolution; the receiver was not operating the business, and the life or right of the corporation to do business has ceased.

3. That the courts are unanimous in holding a receiver liable for the franchise or privilege tax where he operates the business of the corporation.

4. That courts in enforcing the payment of a corporate privilege tax have not distinguished between a public utility and a private corporation.

5. The Michigan Supreme Court finds the case of *United States* v. *Whitridge*, 231 U. S. 144, not controlling of the question before the court.

6. That during receivership, a corporation is not divested of its franchise, nor do they lapse. The court merely takes them into its custody for a time. The franchise "to do" passes to the control of the court.

7. That during receivership the court becomes the custodian of the corporate franchise.

8. That the tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid.

Fundamental Reasoning of the Circuit Court of Appeals in the Instant Case.

(1) The Circuit Court of Appeals does not accept the reasoning of the Michigan Supreme Court that the receiver of a private corporation may only conduct such business as the corporation theretofore organized by charter may transact, claiming that the receiver may, under the direction of the court, do any act which might be performed by any citizen in total disregard of the corporate capacity, and without any reliance whatever upon its franchise. The court does agree that the rule would be otherwise in the case of the receiver of a public utility corporation, indicating that the receiver of a public utility corporation should pay the corporate privilege tax.

(2) That the receiver is not exercising the franchise of the corporation, and that the corporation, during the receivership, has been ousted of its privilege to do business in corporate form.

(3) In the court's opinion the case of *United States* v. *Whitridge*, 231 U. S. 144, is controlling.

Consideration of Decisions in District and Circuit Courts of Appeal.

In *Duryea* v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329, decided by the District Court of

New Jersey in 1904, the court held that a yearly license fee or tax on corporations, which accrued after the receiver was appointed, should be paid by the receiver. City *Davis* v. *Gray*, 16 Wall. 203, 221 (21 L. Ed.) 447, where the court said—

> "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

In *Conklin* v. *United States Shipbuilding Company*, 148 Fed. 129, decided by the New Jersey District Court in 1906, the court held that—

> "The annual franchise tax imposed on corporations by the New Jersey Statute, which provided that such tax shall be a preferred debt in case of insolvency, is a valid preferred charge against the assets of an insolvent corporation being administered by a receiver of a court of equity within the State, whether State or Federal, so long as the corporation remains undissolved. * * *"

Coy v. *Title Guaranty & Trust Co.* (D. C.), 212 Fed. 520, decided in 1914, holds the receiver liable for taxes assessed against personal property while in the hands of a receiver. The court quoted with approval the language of Mr. Chief Justice Fuller, *In re Tyler*, 149 U. S. 164, 182, 13 Sup. Ct. 785, 790 (37 L. Ed. 689)—

> "Undoubtedly property so situated (in custodia legis) is not thereby rendered exempt from the imposition of taxes by the government

> within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, * * *"

In the *State of Ohio* v. *Harris*, 229 Fed. Rep. 898, decided by the Circuit Court of Appeals in 1916, the State of Ohio intervened in a receivership case by petition for payment by the receiver of franchise fees exacted by an Ohio statute. The court construed the Ohio law as being a tax upon the actual doing of business, rather than upon the mere privilege of doing; as is the case under the Michigan law. Finding, as a matter of fact, that the receiver had not conducted the business, the petition of the State was denied; but not until the court had added the following significant statement—

> "When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could not do so if the receiver had during the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchise. Central Trust Company *v.* New York, 250, 257, 18 N. E. 92, 1 L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham."

Bright et al. v. *State of Arkansas*, 249 Fed. 950, decided in 1918 by the Circuit Court of Appeals, 8th Circuit, the court held that the receiver of a railroad company should pay an annual privilege tax under a statute which exacted the tax, for the privilege of exercising its franchise. The court calls attention to the de-

cision of the Supreme Court of the United States in *United States* v. *Whitridge, supra,* and states that the question of the payment of such taxes by a receiver has long been a subject of debate and of conflicting decisions. The court cites decisions from the Circuit Courts of Appeals, and concludes by saying—

> "* * * by the great weight of modern authority, that courts of equity, operating the property and liquidating the debts of corporations which would otherwise have been liable to pay such taxes, ought to direct the payment by their receivers of such taxes as would have accrued during the time the receivers were actually operating the property."

See also the companion case of *Bright et al.* v. *State of Arkansas,* 249 Fed. 953, which holds in favor of the payment of the tax.

In *McFarland* v. *Harley,* 286 Fed. 365, decided in 1923, the Circuit Court of Appeals held the receiver liable for a severance tax accruing after the receiver was appointed. The court held the tax payable, saying—

> "They (the receivers) are custodians of the property for the benefit of the litigants, and the property in their hands should bear whatever tax burdens it would be subject to in the hands of the owners or litigants."

In *People* v. *Hopkins,* 18 Fed. (2nd) 731, decided in 1927, the Circuit Court of Appeals held that the receiver's custody of property of an insolvent estate, held not to give it immunity from liability for franchise taxes under the tax law of New York, Sections 209, 214;

franchise taxes being construed as a tax on the privilege of continued existence as a corporation. The Circuit Court of Appeals then had before it the decision of this Court in the Whitridge case, which is relied upon by the Circuit Court of Appeals in the instant case. The court evidently felt that the Whitridge case was not controlling of the question then before the court, which involved the payment of a corporate privilege tax.

United States v. Whitridge Not Controlling.

We believe that the Whitridge case can be distinguished in reason from the case at bar. The Supreme Court therein stated that the corporation income tax law, there under consideration, was "imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof." The court said the tax was not payable "unless it (the corporate business) be carried on by the corporation," concluding by saying that the corporation income tax law "did not impose a tax upon the income derived from the management of corporate property by receivers under such conditions as are here presented."

The Federal corporation income tax law is fundamentally different from the corporate privilege tax law of Michigan. The tax in Michigan is payable by all corporations ORGANIZED OR DOING BUSINESS in the State. The Whitridge decision clearly states that it is necessary for the corporation to do business before the income tax is payable.

Franchise and Corporate Powers Continue After Receiver is Appointed.

As heretofore stated, the bill of complaint filed in the instant case for the appointment of a receiver did not seek to terminate the corporation. The bill of complaint prayed that "the receiver 'continue and manage its properties and business', etc., and 'that after the corporate debts are paid or secured to the satisfaction of the court, the assets of said grocery company be restored to it'" (R. 7). The officers of the corporation were only enjoined by the order appointing the receiver, from "receiving any debts due to said defendant, or from praying or transferring any of its effects of any kind, or from interfering with said receiver or its operation and conduct of the business" (R. 11).

The general rule regarding the effect upon the corporation of the appointment of a receiver is stated by Clark on Receiver, section 707, as follows:

> "As regards a general equity or *pendente lite* receiver appointed by the federal courts or appointed by a state court not under a statute, the legal existence of a corporation is not cut short by the appointment of such a receiver. The existence of the corporation is not suspended. It is still the corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist subject in their exercise of course to limitations arising out of the changed conditions and situations. Citing Standard Roller Bearing Co. *v.* Hess Bright Mfg. Co. (1921), 275 Fed. 916, 920; affirming Standard Roller Bearing Co. *v.* Hess

Bright Mfg. Co. (1920), 264 Fed. 516; Chemical Nat'l Bank *v.* Hartford Deposit Co. (1895), 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; Du-Pont *v.* Standard Arms Co. (1912), 9 Del., Ch. 315, 320, 81 Atl. 1089. Under such circumstances the corporation may generally do all things necessary to preserve its legal existence notwithstanding the appointment of the receiver to which the temporary management of the corporation's property is given—otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation."

Effect of Appointment of Receiver on Powers of Directors.

The same author states the rule in section 708 as follows:

"The directors of a corporation are given power to act by the legislature creating the corporation. The ordinary equitable appointment of a receiver for the preservation of the assets of a company, pending a suit concerning these assets, does not necessarily destroy the corporation nor deprive the directors of their power to act as directors except as it does prevent the directors from interfering with the receiver's control of the property committed to him. It has been held by the Federal Court that the appointment of a receiver by the State Court of Georgia, since it does not destroy the corporation or deprive the directors of their power, does not deprive the directors of the right to pass a resolution authorizing the bankruptcy of a corporation and to file the same." *In re* Beaver Mills Co. (1921) 275 Fed. 498.

Effect of Appointment of Receiver on Franchises of Corporation.

The same author states the rule in section 709, as follows:

> "The appointment of a receiver *pendente lite* or what is sometimes called an equity receiver of a corporation does not directly affect the charter of the corporation. No court of chancery or other court has inherent power to destroy or take away the charter of a corporation, granted to such corporation by the legislature of the State creating the court or take away a charter created by any other State. Courts can only dissolve or annihilate a corporation, when a statute provides for the continuation of such as may be necessary to close up the business."
>
> "However, frequently receivers are appointed *pendente lite* or otherwise of corporations, which corporations not only possess a charter authorizing them to be corporations, but such corporations frequently possess what are known as franchises or powers granted such corporations by the State or city to operate a railroad, street railway, public utility or perform some other function. The appointment of a *pendente lite* or equity receiver does not of itself abrogate or destroy such a franchise. The object of a receivership when the receiver is ordered to run a business or operate a railway or other public utility is generally to enable the company through its receiver to continue and exercise the franchises and functions granted to the corporation by the State and to avert the suspension of all operation undue such franchises.

> • • • A court operating such property may operate the same through its receiver within the limits and rights laid down by the franchises authorizing such railroad or other public utility to so operate."

From the foregoing it appears that the franchise of the corporation did not vanish with the appointment of a receiver to "continue the business of the Worden Grocer Company" (R. 11). That the stockholders and directors of said corporation remained in possession of their rights as such, with the exception of the right to manage the property, and that the receiver succeeded to the right of management; in accordance with the charter of said corporation. Surely no court would hold that a receiver of a railroad company could operate a business entirely outside of the corporate powers of said company. The court in fixing the powers of the receiver will give effect to the powers of the corporation whose business he is "carrying on." Inasmuch as all assets are turned over to the receiver, who is thereby enabled to continue the business of said corporation for the benefit of creditors and stockholders, it is only reasonable that the State who has granted said charter should be paid a fee from the funds in the hands of the receiver. Can a solvent corporation go into the hands of a receiver and thereby carry on the business of said corporation, enjoying the franchise vested in it by the State and which is continued and acted upon by them, and thereby escape the payment of a fee, exacted by the State as a condition to corporate existence? We do not believe a court will permit this avenue of escape.

This Court is familiar with the rule it has adopted and followed consistently, as aptly stated in 27 Ruling Case Law, page 44, that:

> "In the construction of local statutes the decision of a state court of last resort will govern the Federal Courts; although the same act may have received a different construction in other states."

This rule has been followed in giving effect to decisions in state courts involving taxation.

We appreciate that the Circuit Court of Appeals in the instant case has assigned as a reason why it did not follow the decision of the court of last resort of this state on the question here under consideration, stating that "No question of the construction of a State statute by the highest court of the State was there or is here involved" (R. 34). We cannot justify this conclusion. The tax in question is purely statutory. Whether or not the tax is payable by a receiver depends upon the nature of the tax, which can only be determined by a construction of the particular statute. The Circuit Court of Appeals does in its opinion construe the statute imposing this tax. We submit that it did, by passing upon the question in issue, pass upon the construction of said statute. In determining whether or not a receiver of a corporation should pay a corporate income tax this court in *United States* v. *Whitridge, supra,* was required to construe the statute imposing said tax. The Circuit Court of Appeals in *People* v. *Hopkins; supra,* in determining the liability of a receiver for a corporate privilege tax, construed the statute imposing said tax. As heretofore stated,

our Supreme Court has held that this fee is to be paid by any corporation organized or doing business in Michigan. It being true that the corporate existence was not terminated; that the business was continued and that the receiver for the mutual benefit of the stockholders and creditors who urged his appointment, has profited by the continuation of such business and enjoyed the franchise granted by the state, then under the decision of the highest court of Michigan, this tax is payable. Certainly only confusion can result from direct conflict between the decisions of our Supreme Court and the Circuit Court of Appeals.

In conclusion we wish to quote from the language of the Circuit Court of Appeals, Second Circuit, taken from *People* v. *Hopkins*, 18 Fed. (2nd) 733:

> "With respect to property taxes, it is perfectly obvious that the custody of the receiver should not give the property immunity from taxation. The Supreme Court has stated, with reference to bankruptcy that there is nothing in the dedication of property to the payment of creditors which withdraws it from the necessity of protection by the state and municipality, or exempts it from its obligation to either. Swarts *v.* Hammer, 194 U. S. 441. This reasoning is equally apposite to a chancery receivership, and there is no lack of authority on the point. Coy *v.* Title Guarantee & Trust Co., 220 Fed. 90. With respect to franchise taxes, the result should be the same, and is, when the statute is construed as a tax upon the privilege of continued existence as a corporation. New Jersey *v.* Anderson, 203 U. S. 483. When the statute is construed as a tax upon the privilege of exer-

cising the corporate franchise—that is, of continued operation of the corporate business—franchise taxes subsequent to the receivership are usually upheld if in fact the receivership has continued the business."

The order appointing the receiver provides for the payment of: "all taxes and assessments levied upon the property and assets of said company."

We submit that by reason of this order and the weight of authority this privilege tax should be ordered paid by the receiver out of the funds in his possession, which have resulted by reason of the continuation of the business and franchise of said corporation.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that the conflicting decisions of the Circuit Courts of Appeals and the Michigan Supreme Court may be reviewed and a final rule of law announced and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

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EDWARD A. BILITZKE,
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Counsel for Petitioner.

SCHEDULE "A".

In re Detroit Properties Corp.

1. Licenses—Corporations—Privilege Fee—Excise Tax on Franchise "to do".

Corporation privilege fee is excise tax, not on right to be corporation, but on activities of corporation in exercise of its corporate franchise, or on franchise "to do", not on franchise "to be" (2 Comp. Laws 1929, Sec. 10140).

2. Same—Tax is imposed on Right To Transact, Not on Actual Transaction.

Actual transaction of business by domestic corporation is not condition of privilege tax, but it is imposed on right to transact business (2 Comp. Laws 1929, Sec. 10140).

3. Corporations—Receivers—Licenses—When Receiver Liable For Franchise Tax.

Receiver of corporation is liable for franchise or privilege tax where he operates the business of the corporation under order of court, since he is exercising the franchise "to do", and whether it be private corporation or public utility is immaterial.

4. Same—On Receivership Franchises Pass to Control of Court.

On receivership, corporation is not divested of its franchises, nor do they lapse, but court merely takes them into its custody for a time; the franchise "to do" passing into control of court.

5. Same—Receiver is Officer of Court.

Receiver of corporation is creature or officer of court, and is not agent of corporation.

6. Same—Receiver Takes Place of Corporation and Officers.

Receiver of corporation conducting its business takes place of corporation and its officers for purpose of

performing necessary corporate duties and functions, and has same powers for such purposes, but he cannot act in excess of corporate powers, and court cannot invest him with authority to that extent.

Certiorari to Corporation Tax Appeal Board. Submitted April 7, 1931. (Docket No. 9, Calendar No. 35,451.) Decided June 1, 1931.

Union Guardian Trust Company, receiver of the Detroit Properties Corporation, a Michigan corporation, was ordered to pay an annual privilege fee by the Secretary of State. Receiver appealed to Corporation Tax Appeal Board, where the order of the Secretary of State was affirmed. Receiver reviews affirmance of the order by certiorari. Affirmed.

Beaumont, Smith & Harris (M. S. Harlan and Richard W. Larwin, of counsel), for plaintiff.

Paul W. Voorhies, Attorney General, and Charles Rubiner, Assistant Attorney General (Alice E. Alexander, of counsel), for defendant.

FEAD, J.:

This is certiorari to the corporation tax appeal board to review affirmance of a levy of corporation privilege tax by the secretary of State.

The Detroit Properties Corporation was incorporated under the laws of this State to buy and hold real estate, stocks, bonds, or other securities and to deal in the same. A bill of complaint was filed against it by a creditor, alleging, in substance, that the corporation was solvent but confronted with immediate financial embarrassment and praying, among other things, for the appointment of a receiver, with authority to continue the business of the defendant and "to protect and preserve its franchise and privileges." The court appointed Union Guardian Trust Company

temporary receiver with the usual powers and also authority—

> "in general to operate the business of the defendant as fully as the defendant operated same and in the manner best calculated in the opinion of the receiver to fully protect that business, to the end that the business of the defendant may be preserved as well as its assets."

The issue is whether the corporation is subject to the privilege fee which, by 2 Comp. Laws 1929, Sec. 10140, every domestic corporation is required to pay "for the privilege of exercising its franchise and of transacting its business within this State," and which accrued after the appointment of the receiver and its taking control of the corporate property and business. The question is one of first impression with this Court.

The privilege fee is an excise tax, not upon the right to be a corporation, but upon the activities of the corporation in the exercise of its corporate franchise, or, as it is sometimes expressed, upon the franchise "to do," not upon the franchise "to be."

Union Steam Pump Sales Co. v. *Secretary of State*, 216 Mich. 261, 272;
In re: Detroit & Windsor Ferry Co., 232 Mich. 574;
In re: Truscon Steel Co., 246 Mich. 174;
Cobbs & Mitchell v. *Corporation Tax Appeal Board*, 252 Mich. 478, 481.

Actual transaction of business by a domestic corporation is not a condition of the tax. It is imposed on the right to transact. *In re: G. H. Hammond Co.*, 246 Mich. 179; 2 Comp. Laws, 1929, Sec. 10140.

In all the cases cited or found, where the power to impose a similar tax during receivership has been denied, it has appeared that the corporation was insolvent, or in process of liquidation, or had been pro-

hibited by law or injunction from exercising its franchises, or the proceedings were for dissolution, the receiver was not operating the business, and the life or right of the corporation to do business had ceased.

Jones v. *Winthrop Savings Bank,* 66 Me. 242;
Johnson v. *Johnson Brothers,* 108 Me. 272, 296 (80 Atl. 741, 750, Ann. Cas. 1913 A, 1303);
State v. *Bradford Savings Bank,* 71 Vt. 234 (44 Atl. 349);
Commonwealth v. *Lancaster Savings Bank,* 123 Mass. 493;
Greenfield Savings Bank v. *Commonwealth,* 211 Mass. 207 (97 N. E. 927);
Keeney v. *Dominion Coal Co.* (D. C. (Ohio)), 225 Fed. 625;
State of Ohio v. *Harris* (C. C. A.), 229 Fed. 892.

In holding a receiver liable for a tax "for the privilege of operation of the street railway in public ways" in *Collector of Taxes* v. *Railway,* 234 Mass. 336, 342 (125 N. E. 614), the court used language applicable to all the above cases:

> "There are numerous cases which have held that a corporation in the hands of a receiver is not subject to a franchise tax. Those are cases, however, where the corporation has been prohibited by law or by injunction from exercising its franchises and the receiver is not using them, or the corporation is in process of liquidation."

The cases in which the power to tax has been upheld are many, but some of them have aspects which cause them to be more or less distinguishable from that at bar.

In some States the tax is on the franchise of the corporation "to be" and seems to be collectible until legal dissolution or its equivalent. *Kirkpatrick* v. *Board of Assessors,* 57 N. J. Law, 53 (29 Atl. 442);

In re United States Car Co., 60 N. J. Eq. 514 (43 Atl. 673); *Duryea* v. *American Woodworking Machine Co.* (D. C. (N. J.)), 113 Fed. 329; *Conklin* v. *United States Shipbuilding Co.* (D. C. (N. J.)), 148 Fed. 129; *In re Malko Milling & Lighting Co.* (D. C. (Md.)), 32 Fed. (2d) 825; *State* v. *Bradley*, 207 Ala. 677 (93 South. 595, 26 A. L. R. 421).

In some other States statutes provide for the collection of such taxes from a receiver. The courts, however, have not laid decision upon the ground that such special provision created the liability of the receiver for franchise taxes, but have founded liability upon general principles as well. *Bright* v. *State of Arkansas* (C. C. A.), 249 Fed. 950; *Armstrong* v. *Emmerson*, 300 Ill. 54 (132 N. E. 768, 18 A. L. R. 693). In Ohio, where such a statute exists, it has been held, in conformity with the rule elsewhere, that an insolvent corporation which could not exercise its franchise is not subject to the tax when under receivership. *Keeney* v. *Dominion Coal Co., supra; State of Ohio* v. *Harris, supra.* But where the receiver continued the business of the corporation, the tax was sustained. *Morley* v. *Cleveland Hippodrome Co.*, 23 Ohio C. C. (N. S.) 295; *Gerke Brewing Co.* v. *Kuerze*, 7 Ohio App. 37; *Guardian Savings & Trust Co.* v. *Templar Motors Co.*, 116 Ohio St. 95 (155 N. E. 691).

The New York statute, Cahill's Consol. Laws of New York, 1930, Chap. 61, Sec. 209, usually reported in the cases as "Consol. Laws, C. 60," provides a tax on corporations generally, "for the privilege of exercising its franchise in this State in a corporate or organized capacity;" and for railroad companies in substantially the same language (Chap. 61, Sec. 184). See *People* v. *State Tax Comm.*, 189 App. Div. 347 (178 N. Y. Supp. 486). It is held that the tax may be levied during a receivership when the receiver is authorized to carry on the business of the corporation. *Central Trust Co.* v. *Railroad Co.*, 110 N. Y. 250 (18 N. E. 92,

1 L. R. A. 260); *People* v. *State Tax Comm., supra; New York Terminal Co.* v. *Gaus,* 204 N. Y. 512 (98 N. E. 11); *People* v. *Hopkins* (C. C. A.), 18 Fed. (2d) 731; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* (D. C. (N. Y.)), 8 Fed. (2d) 305. See, also, *New York Trust Co.* v. *Island Oil & Transportation Co.* (D. C. (N. Y.)), 7 Fed. (2d) 416; *Philadelphia & R. R. Co.* v. *Commonwealth,* 104 Pa. 80.

To complete the review of authorities, we are informed by counsel that the Federal district court of the western district of Michigan and the standing master in chancery of the eastern district, in unreported cases, have sustained the Michigan tax under conditions similar to those at bar.

It appears, then, that the courts are unanimous in holding a receiver liable for the franchise or privilege tax where he operates the business of the corporation. May the rule be sustained in principle?

Plaintiffs seek to draw a distinction between public utility corporations with special and public functions and private corporations, but we do not find that the courts have done so, except in *Mather's Sons' Co.'s Case,* 52 N. J. Eq. 607 (30 Atl. 321), where it was pointed out that the receiver of a public utility corporation must pay the tax because it is his duty to preserve the franchise, while the receiver of a private corporation pays only as long as he uses the franchise, and, when the corporation is adjudged insolvent, the obligation ceases; and in master's report in *Providence Engineering Corp.* v. *Downey Shipbuilding Corp., supra,* p. 308, where the distinction was denied. A private corporation obtains its powers from the State, as does a public utility, and if the receiver uses the franchise of the corporation when he carries on the business, there is no basis for the distinction claimed.

Plaintiffs also stress *United States* v. *Whitridge,* 231 U. S. 144 (34 Sup. Ct. 24), in which the court held

that the Federal corporation tax is not assessable while the corporation is under receivership. The decision has been cited in many of the cases upon the instant question and variously distinguished. We have not discovered that it has been held authority by any court for denial of the right to levy a franchise tax on a corporation under receivership, although there is dictum to that effect. *In re Continental Candy Co.* (D. C. (N. Y.)), 291 Fed. 773; *Bright* v. *State of Arkansas, supra.* In the latter case it was held not controlling of the instant question, as against the weight of authority and uniformity of decision. Fundamentally, in *United States* v. *Whitridge,* the court held that the Federal tax was not upon the corporate franchise or right to do business, but upon the act of doing business by the corporation itself. The opinion demonstrates that the ruling was a special construction of a special law with a special background and purpose and was not founded upon, and did not establish, general principles applicable to other laws.

The cases holding that a trustee in bankruptcy is not liable for the tax are not pertinent. They point out that, unlike a receiver, the trustee takes the whole title to the corporate property, and, in operating the business, he does so as an individual, and does not exercise the corporate franchises. *In re Continental Candy Co., supra; In re Century Silk Mills* (D. C. (N. Y.)), 12 Fed. (2d) 292.

On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise "to do" passes to control of the court. *Detroit, etc. R. Co.* v. *Campbell,* 140 Mich. 384; *Grand Rapids Trust Co.* v. *Carpenter,* 229 Mich. 491; *United States* v. *Whitridge, supra.*

The receiver is the creature or officer of the court and is not an agent of the corporation. *Face* v. *Hall,*

183 Mich. 22. But when he is authorized to carry on the business of the corporation, his authority does not come wholly or solely from the equity powers or jurisdiction of the court. The grant of corporate powers is a legislative function. The court, out of its own powers, cannot confer them upon an individual. It could not authorize the receiver to conduct a business not within the corporate charter. The power of the court to authorize the receiver to continue the business of the corporation exists only because the court has become the custodian of the corporate franchises. In so authorizing, it merely directs the person who shall exercise powers belonging to the corporation by legislative grant.

"The receiver of a corporation, conducting its business, takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions, and has the same powers for such purposes, while on the other hand, he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent." 14-A C. J. p. 1005.

So it follows that, in conducting the business under order of court, the receiver is exercising the franchise "to do" of the corporation. Substantially all the above authorities sustaining the tax so hold. See, also, *State* v. *Sessions*, 95 Kan. 272, 278 (147 Pac. 789).

The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid. This ruling is confined to the case before us and without prejudice to the contentions of counsel as to liability under other circumstances.

The determination of the board is affirmed.

Butzel, C. J., and Wiest, Clark, McDonald, Potter, Sharpe, and North, JJ., concurred.

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UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES

October 1931 Term

PEOPLE OF THE STATE OF MICHIGAN, By John S. Haggerty, Secretary of State,
Petitioner,

vs.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,
Respondent.

No. 598.

BRIEF OF THE PEOPLE OF THE STATE OF MICHIGAN.

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UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES

October Term, 1931

PEOPLE OF THE STATE OF MICHIGAN, By John S. Haggerty, Secretary of State, Petitioner, vs. MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company, Respondent.	No. 598.

BRIEF OF THE PEOPLE OF THE STATE OF MICHIGAN.

On February 15, 1932, this Court granted the petition for a writ of certiorari in the above cause, to review the decision of the Circuit Court of Appeals—Sixth Circuit —(R. 34) reversing the decision of the District Court (R. 16), which had ordered the receiver of a Michigan corporation to pay the state corporation privilege fee, which accrued after the receiver had been appointed.

FACTS

The Woolson Spice Company, an Ohio corporation, on February 9, 1926, petitioned the District Court of the United States, Western District of Michigan, for the ap-

pointment of a receiver for the Worden Grocer Company, a Michigan corporation, then engaged in the wholesale grocery business (R. 2), alleging that the Worden Grocer Company was indebted to it in the sum of $3,344.14 (R. 2); that the Worden Grocer Company was then engaging in the real estate business through a subsidiary company known as the Worden Realty Company (R. 3); that because preferred stockholders of the Worden Grocer Company were demanding payment of their stock, and by reason of the inability of the Realty Company to retire the mortgage given at the time a bond issue was floated by the Realty Company, the petitioner, the Woolson Spice Company, feared that its account would not be paid (R. 3). It alleged that while the grocery company was solvent (R. 4) it feared the business would suffer, because of threatened suits to force the payment of other claims, and by reason of the foreclosure of said mortgage (R. 5); that the interests of the creditors and stockholders would be "best subserved if a receiver be appointed to take charge of the properties and business of the Worden Grocer Company, and with power to borrow moneys wherewith to operate the business thereof, and to protect the right of the Worden Grocer Company to occupy the real property at the City of Grand Rapids, owned by Worden Realty Company, and for such other purposes as may be necessary in order to avoid sacrifice and waste of the corporate assets" (R. 6). It prayed that the receiver "continue and manage its properties and business," etc., and "that after the corporate debts are paid or secured to the satisfaction of this (District) Court, the assets of said grocery company be restored to it" (R. 7). By resolution the grocery company consented to the appointment of a receiver (R. 9). The order appointing the receiver, made February 9, 1926, authorized the receiver

"to carry on the business now carried on by Worden Grocer Company" R. 11).

Thereafter, on February 28, 1930, the petitioner herein, in behalf of the People of the State of Michigan, petitioned said District Court (R. 12) for an order compelling the receiver to file annual reports with him as Secretary of State, and to pay to him, as Secretary of State, the corporation privilege tax for the years 1926, 1927, 1928 and 1929, stipulated by counsel to amount to $10,988.26 (R. 22 and 24). Said privilege tax being imposed by Acts 84 and 85 of the Public Acts of 1921 (R. 13).

On August 1, 1930, the District Court, through Judge Raymond, granted the prayer of said petition and ordered the payment of said privilege taxes. (R. 19). It appears from the order of the district Court that the assets of the grocery company were sold on December 30, 1929 (R. 20); that the receiver has paid a 25 per cent dividend to the common creditors (R. 20). No part of said tax has been paid.

ADDITIONAL FACTS FOUND BY UNITED STATES DISTRICT COURT

"In the present case there is no question that during the years for which it is sought to apply the privilege tax the receiver actively conducted the corporation business. * * * The bill of complaint filed in this cause asked for the appointment of receiver with power to take possession of all the property, assets and business of the corporation and with full power to operate, continue and manage the properties and business. This was consented to by resolution of the board of directors of the corporation, the resolution being adopted on the same day on

which the bill of complaint was filed. There is in the bill of complaint *no averment of insolvency or indication of intent either to dissolve the corporation or to wind up its affairs.* There is the clear expression of the purpose or at least the expectation that when the then present emergency had passed there would be left a surplus for the corporation. The evident purpose of the bill of complaint was to have the business of the corporation continue without interruption by creditors or others and the aid of the court was invoked to prevent such interruption by what amounted in effect to the declaring of a moratorium against creditors. For the purpose of staying the hands of creditors, the board of directors surrendered its custody and control of the property of the corporation. For all other purposes it continued. The destiny of the corporation was to a considerable extent still under its control. It might have filed a petition in bankruptcy (see Struthers Furnace Co. v. Grant, 30 Fed. (2d) 576). When, after several years of operation, the hope vanished that the normal corporate activities might be resumed the board of directors might have filed a formal notice of dissolution without affecting the receivership. They probably could have filed a certificate reducing the amount of its capital stock. The indisputable fact is that the corporation retained the privilege of exercising its franchise throughout the claimed taxable period and that the receivers continued to operate the business. In this case, it is undeniable that the board of directors of the corporation and the receiver (whose appointment and activities it either sought or concurred in) continued to exercise all of the privileges of the franchise of the Worden Grocer Company."

ISSUES

1. Is a receiver of a Michigan corporation, alleged to be solvent, appointed by a United States District Court, with the consent of the Board of Directors, to carry on the business of the corporation, rather than to wind up its affairs, liable for the state corporation privilege taxes which accrue during the period of the receivership?

2. Was the Circuit Court of Appeals correct in holding that the assets in the hands of the receiver should not be chargeable with this tax; but "should it appear that a surplus over indebtedness was payable by the receiver to stockholders, for and on account of their stockholdings, such fund would be chargeable with the claim of the state for franchise taxes, for, to this end alone, the corporation existence must be regarded as continued for the stockholder's benefit. That the state may share in the distribution of assets only if and after other creditors and the expenses of the receivership are paid in full".

MICHIGAN STATUTES INVOLVED.

(Numbers in parentheses refer to the compiler's sections in Compiled Laws, 1929. The asterisks denote omission of irrelevant matter; and the italics are ours).

The privilege fees here claimed, were imposed by the State of Michigan pursuant to the provisions of Act 85, P. A. 1921, and during the period in question have provided variously, in part, as follows—

"Sec. 4. (Effective from 1923 to May, 1927) Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by Section 7 hereof, *for the privilege of exercising its franchise and of transacting its business within this state,* pay to the secretary of state, an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars." (Act No. 233 P. A. 1923)

The same section as amended by Act 140 P. A. 1927, effective May 11, 1927, reads as follows—

"Sec. 4. (Effective from May, 1927, to May, 1929) Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, *for the privilege of exercising its franchise and of transacting its business within this state,* pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars."

By Act No. 175, P. A. 1929, effective May 20, 1929, (C. L. Sec. 10140) the legislature added to said Section 4, as previously amended, the following—

"Sec. 4. * * * It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, *having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.*"

The general corporation act, Act No. 84 P. A. 1921, during the period in question has provided variously, in part, as follows—

Section 5, Chapter 2, Part V thereof, (C. L. Sec. 10127) as amended by Act No. 72 P. A. 1929, in ways not affecting the issues at bar, provides in part as follows—

"Sec. 5. Every corporation organized for pecuniary profit * * * excepting only railroad companies and interurban railroad companies, telephone and telegraph companies, express companies and foreign insurance companies, shall, annually in the month of July or August file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided: * * * Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. The secretary of state is hereby authorized to require of any corporation any additional information that may be needed after the filing of its annual report for the purpose of computing such fee. * * * Such reports shall be * * * deposited in the office of the secretary of state within the said month of July or August accompanied by a filing fee of two dollars, and the amount of the annual franchise fee provided by law." * * *

Section 6 of said chapter (C. L. Sec. 10128) provides, in part, as follows—

> "Sec. 6. * * * If any corporation neglects or refuses to make and file the reports required by this chapter within the time herein specified, and shall continue in default for ten days thereafter, its corporate powers shall be suspended thereafter, until it shall file such report, and it shall not maintain any action in any court of this state upon any contract entered into during the time of such default."
> * * *

Section 7 of said chapter, added by Act 172 P. A. 1923, provided, until the 1929 amendment, in part as follows—

> "Sec. 7. * * * If any corporation which is now or may hereafter be required to file its annual report with and pay a franchise fee or tax to the secretary of state, shall for two consecutive years neglect or refuse to file such report or to pay such fee or tax, the charter of such corporation shall be void unless the secretary of state shall for good cause shown extend the time for the filing of such report or the payment of such fee or tax as the case may be. In case of an extension of time as provided in this section, the secretary of state shall file in his office a certificate showing the length of time granted by such extension: Provided, That in no case shall the total extension of time granted be more than one year."

Following a holding by the Supreme Court of Michigan that this provision regarding the forfeiture of franchise was not self-executing (Turner v. Western Hydro-electric Co. 241 Mich. 6) the following amendment being C. L. Sec. 10130 was enacted, and became effective August 28, 1929, making the forfeiture provision self-executing—

"Sec. 7. * * * If any corporation which is now or may hereafter be required to file its annual report with and pay a privilege tax to the secretary of state shall for two consecutive years neglect or refuse to file such report or to pay such fee or tax, the charter of such corporation shall be absolutely void, without any judicial proceeding whatsoever, unless the secretary of state shall for good cause shown extend the time for the filing of such report or the payment of such fee or tax as the case may be. In case of extension of time as provided in this section the secretary of state shall file in his office a certificate showing the length of time granted by such extension: Provided, that in no case shall the total extension of time granted be more than one year. *The provisions of this section are hereby declared to be self-executing.*"

Section 7, Chapter 4, Part I, (C. L. Sec. 9976) provides in part as follows—

"Sec. 7. In any case where a corporation shall be dissolved by process of law, or whose term of existence shall terminate by limitation and not be renewed, or whose property and franchise shall be sold at mortgage sale, or if for any reason the attitude of the corporation toward the state shall be changed from that set forth in the articles without a formal dissolution, it shall be the duty of the last board of directors thereof, within thirty days thereafter to file a certificate to such effect with the secretary of state signed by a majority of the remaining members of such board and accompanied with the fee prescribed, which certificate shall be filed or recorded along with the original articles." * * *

CONSIDERATION OF MICHIGAN STATUTES AND CONSTRUCTION PLACED THEREON BY MICHIGAN SUPREME COURT

It clearly appears from the Michigan statutes above quoted that the tax imposed upon corporations is levied upon the corporate franchise "to do" rather than the corporate franchise "to be". This construction was placed upon the statute by the Supreme Court of Michigan in Union Steam Pump Sales Company v. State, 216 Mich. 271, decided in 1921, where the court quoted with approval from Joyce on Franchises, Sec. 38, as follows:—

> "The franchise of being a corporation belongs to the corporators, *while the powers, rights and privileges* vested in and to be exercised by the corporate body as such constitute *franchises* of the corporation."

The Supreme Court of Michigan In Re G. H. Hammond Co., 246 Mich. 182, decided in March, 1929, said:—

> "Michigan has seen fit to adopt legislation by which the annual privilege fee is imposed upon a corporation *organized* under its laws *regardless* of whether the corporation does any business within the state."

In the Hammond case it appeared that the corporation which was ordered to pay the tax was a Michigan corporation, with an office in Michigan, but that it transacted no corporate business in Michigan. The Supreme Court called particular attention to the language of the statute which imposed the tax on any corporation *organized* under the laws of Michigan and sustained the payment of the tax.

Our Supreme Court of Michigan in Re Detroit Properties Corporation, 254 Mich. 524, decided in June, 1931, called attention to the foregoing decisions and approved the construction placed upon the corporation laws of this state, holding a receiver who had been appointed to carry on the business of a solvent corporation liable for the corporation privilege tax maturing after the receiver was appointed.

Circuit Court of Appeals Follows In Part The Decision of the Supreme Court of Michigan

The Circuit Court of Appeals in the instant case recognizes the liability of the corporation in question to pay the privilege tax maturing during the period of the receivership, but holds that the tax is only payable out of funds in the hands of the receiver, after the expenses of the receivership and all creditors have been paid, basing said conclusion upon the reasoning that the receiver did not use any of the franchises of the corporation, and that the receiver takes the property charged only with the debts and liabilities of the corporation, which exist at the time of his appointment. The Circuit Court of Appeals justifies this conclusion by holding that the receiver of a private corporation may transact any act which might be performed by any other citizen in total disregard of the corporate capacity of the former possessor of the property, and without any reliance whatever upon its franchises. That the limitation to the effect that the receiver may normally transact only such business as is authorized by the corporate charter arises from the implied contract between the corporation and its stockholders that the money invested shall be used only for such purposes.

ARGUMENT

Prior to an analysis of the rules of law applicable to the question now before this court, we wish to stress the following undisputed facts in the case at bar:

1. The corporation was not insolvent at the time the receiver was appointed by and with the consent of the directors.

2. The receiver carried on the business of the corporation for a period of upwards of 3½ years, and took possession of and proceeded to collect all the accounts and obligations of said corporation.

3. That the trial court, the U. S. District court in sustaining the payment of this tax, after listening to the argument of counsel in open court and being fully advised in the premises found as a fact, that the Board of Directors of the corporation and the receiver continued to exercise all the *privileges* and *franchises* of the Worden Grocer Company.

4. That the order appointing the receiver provided for the payment by it of "*all taxes and assessments* levied upon the property and assets of said company".

5. That the company, its officers, servants and agents were only enjoined by an order of the court made at the time the receiver was appointed, from receiving debts and transferring effects of any kind and interfering with the operation and conduct of the business.

6. That the corporation was not terminated until after December, 1929, when the property was sold by order of the court, which was after the 1929 tax was payable.

7. That the receiver by reason of the order of the court took into his possession all property and assets of the corporation and after conducting said business for a period of upwards of 3½ years has distributed to the

common creditors of the said corporation a dividend of twenty-five per cent.

8. That under the decision of the Circuit Court of Appeals the corporation tax in question is payable out of any surplus over indebtedness payable by the receiver to the stockholders for and on account of their stock holdings, and that the state may share in the distribution of assets only if and after other creditors and expenses of the receivership are paid in full. Under this decision, common creditors of the corporation are preferred to the claim of the state for this tax.

The Argument Will Be First Presented By Grouping as Assignments of Error the Several Conclusions Reached by The Circuit Court of Appeals, in the Order in Which They Appear in the Opinion of That Court, as follows:

1. That the court erred in holding that the receiver in the instant case did not exercise any of the franchises of the corporation, and that the receiver, may perform under the direction of the court, any act which might be performed by any other citizen, in total disregard of the corporate capacity, and without any reliance upon its franchises.

2. That the court erred in holding that the limitation upon the power of the receiver to transact only corporate business, arises solely by reason of the implied contract between the stockholders and the corporation.

3. That the court erred in making a distinction between a public utility corporation, and a private corporation, indicating that in the case of a public utility corporation, a receiver would be liable for the corporation privilége tax.

4. That the court was in error in citing United States v. Whitridge, 231 U. S. 144, in support of its

contention that the receiver was not liable for the privilege tax.

1.

The Circuit Court of Appeals Erred in Holding That The Receiver In the Instant Case Did Not Exercise Any Of The Franchises Of The Corporation, And That The Receiver, May Perform Under The Direction Of The Court, Any Act Which Might be Performed By Any Other Citizen, In Total Disregard Of The Corporate Capacity, And Without Any Reliance Upon Its Franchises.

Let us first consider what is meant by "Franchises of The Corporation", as used in the statute imposing said tax. When the Michigan legislature used the term "for the privilege of exercising its franchise", did "franchise" mean a special right or privilege granted a public utility corporation to engage in a public enterprise, or did it mean all rights, privileges and powers granted a corporation, whether public or private? We believe it is clear that the legislature used the term in the latter sense, because the act in question expressly excepts from its operation such public utility corporations as "railroad companies, interurban railroad companies, telephone and telegraph companies, express companies, and foreign insurance companies."

The Michigan Supreme Court in Union Steam Pump Sales v. State, supra, defines "franchises", as follows:

> "The franchise of being a corporation belongs to the corporators, while the *powers, rights* and *privileges* vested in and to be exercised by the corporate body as such, *constitute franchises* of the corporation."

This interpretation of the Michigan Supreme Court, of a local statute, should be accepted and followed in Fed-

eral Courts. In 3 Thompson on Corporations (2d Ed.), Sec. 2864, the author says:

> "On the other hand, the secondary or *annexed franchises*, by which is meant the *privileges, powers and franchises* of the corporation necessary to its operation and the properties possessed by it, belong to the corporation as a corporation and not to the individual members or corporators."
>
> "The word 'franchise' is to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute. Cedar Rapids Water Co. v. City of Cedar Rapids, 91 N. W. 1081.
>
> "The right to be and do business as a corporation is a franchise. The power to exercise a franchise is one of the most important a corporation can acquire." Iron Silver Min. Co. vs. Cowie, 72 Pac. 1067.

In Mather's Son's Co.'s Case (1894) 52 N. J. Equity Reports 608, the issue was the payment of a franchise tax by a receiver of a private corporation. It appeared that the receiver carried on the business of the corporation under order of the court. The court said "a receiver does not necessarily in every case deal with the corporate entity or its franchise. His duty may be confined entirely to the administration of assets which exist at the time of his appointment."

The court held the tax payable saying:

> "What is to be considered an exercise of franchise of an insolvent corporation by a receiver may vary with the circumstances in each case. Where the ordinary and usual business of the corporation is continued, as in the present instance, at a profit, in the name of the company, by the receiver, in the hope that financial difficulties may be adjusted and

the assets may be restored to the company, there can be little discussion in concluding that it is the duty of the receiver to pay the tax while he continues the business."

In Providence Engineering Corp. (1925) 8 F. (2) 304, the court in holding a private corporation liable for a privilege tax maturing during the receivership, said:

"The receivers had the right and did actually to some extent carry on the business of the corporation which thereby became liable to pay the tax. The corporation which was alleged to be solvent, had all the benefit to be derived from the right to conduct business."

It therefore follows that the right to engage in business under the name of Worden Grocer Company; to carry on the grocery business as such; to hold and convey property; to collect accounts and to do all things necessary to carry on the business of said corporation, are franchises granted said corporation. When the receiver under the order of the court took over the management of the business of said corporation, and undertook to collect all assets of said corporation, and finally when he consummated a sale of all the property of said corporation, he was through the order of the court, exercising franchises which had been granted said corporation.

As to the effect of the Appointment of a Receiver on the Franchises of a Corporation, we submit the following:

(Sec. 703 of Clark on Receivers) "The appointment of an equitable receiver and manager of a company over the assets and business of the company does not dissolve or annihilate the company. Both

continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance. A court of equity can not kill or destroy an individual, neither can it destroy a corporation, but it can take possession of the business and property of an individual, to preserve or realize for creditors and it can take possession of the business and property of a corporation and preserve it or realize it for creditors, and in doing so, leave nothing but the shell of the corporation. It can not destroy that shell, however, except by statute."

(Section 707 of Clark on Receivers) "As regards a general equity or pendente lite receiver appointed by the federal courts or appointed by a state court not under a statute, the legal existence of a corporation is not cut short by the appointment of such a receiver. The existence of the corporation is not suspended. It is still the corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist subject in their exercise of course to limitations arising out of the changed conditions and situations. Under such circumstances the corporation may generally do all things necessary to preserve its legal existence notwithstanding the appointment of the receiver to which the temporary management of the corporation's property is given,—otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation."

"It has further been held in New Jersey that putting a corporation in charge of a receiver does not work its dissolution, but that meanwhile the corporation exists with all its franchises exercisable by the receiver in the management of its affairs, subject to all the duties, obligations and liabilities that rested upon the corporation itself."

"Although a receiver may operate a railroad or other public utility, ordinarily enjoying the full franchises which the railway formerly owned, nevertheless such a receiver cannot exceed those franchises any more than the original owner of the franchise could so exceed the franchise. Furthermore, a court operating such a property must operate the same through its receiver within the limits and rights laid down by the franchises authorizing such railroad or other public utility to so operate." Citing Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation (1918), 253 Fed. 453.

(Section 861 of Clark on Receivers) "Though appointed by a Court and acting as its officers, the receivers of a railroad corporation, who are authorized to operate and manage a railroad, stand, for the time being, in many important respects, in the place of the corporation itself. They have sole possession of the railroad and of the property belonging to the corporation. They run trains, carry passengers, transfer freight, and conduct in the usual manner those active operations for which the railroad was intended and constructed. They act as common carriers by virtue of and under the franchise conferred on the corporations, and as such, so far as the public is concerned, are subject to the same duties and liabilities, in very many, if not all respects, to which the corporation is subject, and which are imposed on it by the exercise of the power conferred by the franchise." Citing Erb v. Morasch (1900) 177 U. S. 584.

In Central Trust Co. v. New York, (1888) 110 N. Y. 250, 18 N. E. 92, the court of last resort of the State of New York held that where a receiver of a railroad company was operating the road, recourse might be had to the funds in his hands for the payment of the tax on the franchise of the corporation levied under the New York corporation tax act, the court saying in part:

"It is claimed, however, that when a receiver is appointed by the court, if he operates the railroad under its order, he does so by virtue of the equity powers of the court conferred by the constitution; and hence that the receiver is not bound to pay the taxes, although he receives all the earnings of the company. But what does the receiver operate? Under this order of the court he takes possession of all the property of the corporation, and proceeds to operate, that is, to run, its trains, and to do all that was formerly done under the direction of the board of directors. IN THIS WAY HE USES THE FRANCHISE WHICH HAS BEEN CONFERRED BY THE STATE UPON THE COMPANY AND HE USES IT AS AN OFFICER OF THE COURT WHICH IS ADMINISTERING THE AFFAIRS OF THE COMPANY AND THROUGH THE COURT HE ACTS AS THE COMPANY TO THE SAME EXTENT PRO HAC VICE, AS IF THE BOARD OF DIRECTORS WERE OPERATING THE RAILROAD. IT IS THE FRANCHISE WHICH IS BEING USED IN BOTH CASES, only in one case it is used for the company, and substantially by it, by means of its board of directors; while in the other case the same franchise is being used, and the road is operated under it, by an officer of the court, until, by virtue of the legal proceedings, connected with the receivership, the receiver is discharged and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law."

The above decision was reached as early as 1888. Again in 1912 the same court, in New York Terminal Company v. Gaus, 204 N. Y. 512, 98 N. E. 11, reaffirmed the right of the state to collect such fees against a receiver "for the privilege of doing business or exercising its corporate franchise." The court said:

"It is the contention of the appellant, in effect, that the provisions for a franchise tax have no application to such a case as this, where the corporation is in the hands of a receiver and has ceased itself, to operate. I think the fallacy of the contention is in an evident assumption that, in his conduct of the business of the corporation, the corporate franchise is not being used by the receiver. The tax levied by the comptroller by virtue of section 182 was a tax upon the franchise, as distinguished from the property of the corporation. It is imposed, as it declares, upon the privilege of carrying on business and of exercising the corporate franchises."

A comparison of the statutes of New York, imposing these privilege fees, with those of Michigan indicate that the two are almost identical since both are directed at the privilege of doing business and not at the doing of the business itself.

In In Re U. S. Car Co., 60 N. J. Equity, 514, 43 Alt. 673, it appears from the statement of facts in the opinion that "The receivers in the present case have not in their hands assets sufficient to pay those debts of the corporation which existed at the time of their appointment; nor have they continued the business of the corporation in any way, nor exercised any of its franchises." The question presented to the court was whether under these circumstances the state was entitled to priority in payment out of the assets in the hands of the receiver of a tax assessed against the corporation after their appointment. In the court below it was held that since the corporate franchises were useless and since also they had not been used by the receivers, the tax was not collectible until after all indebtedness existing at the time of the appointment of the receivers was discharged. This holding was reversed by the appellate court, with the following language:

"We cannot concur in this view. Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence."

"The State, in creating a corporation, has the right to impose upon its creation such conditions as the legislature, within constitutional limits, may deem proper; and the acceptance by the corporation of the franchises, powers, and privileges conferred upon it binds it to the performance of those conditions, so long as it continues to remain in possession of those franchises, powers, and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors, or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or nonexistence of the corporations. Applying this test, it is quite clear that the so called tax was properly imposed in the present ease. At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it; but, on the contrary, its corporate life was continued for the benefit of its creditors pending the final distribution of its assets."

In Armstrong v. Emmerson, 300 Ill. 54, 18 A. L. R. 700, it appeared that the plaintiff was receiver of a railway corporation under a United States District Court Degree and had operated the railroad pursuant to authority granted by the court. The secretary of State as-

sessed the annual license fee or franchise tax upon the capital stock of the company and demanded payment of the receiver. Payment was made under protest and a bill filed to require its repayment to the receiver. The bill was however dismissed, the court saying in part:

> "We have held that the appointment of a receiver for a railroad company creates no change in the corporate body, but its existence remains, with its legal functions unimpaired, its acts being performed by agents appointed by the court, and not by the corporation. The court does not enlarge or restrict the powers and duties conferred by the charter, but assumes the management of the corporation, under and in accordance with the charter, and is bound by its provisions, and the agents appointed by the court are inquired to act within the limits of the charter and to perform the duties imposed by it.
>
> "In Central Trust Co. v. New York Central and Hudson River Railroad Co., 110 N. Y. 250, it was held the receiver was liable to the franchise tax. It was said: 'It is claimed, however, that when a receiver is appointed by the court, if he operates the railroad under its order he does so by virtue of the equity powers of the court conferred by the constitution, and hence that the receiver is not bound to pay the taxes although he receives all the earnings of the company. But what does the receiver operate? Under this order of the court he takes possession of all the property of the corporation and proceeds to operate,—that is, to run,—its trains and to do all that was formerly done under the direction of the board of directors. In this way be uses the franchise which has been conferred by the State upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court, he acts as the company to the same extent pro hac vice as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case

it is used for the company and substantially by it by means of its board of directors, while in the other case the same franchise is being used and the road is operated under it by an officer of the court, until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged and the road returned to its former possessors or other proceedings taken under a re-organization, as provided by law.' "

Thompson on Corporations, says on this point:—

"Insolvency of a corporation does not relieve its franchise from liability to assessment in states having franchise tax laws. The franchises are still exercisable by the receiver. It follows that the receiver of a PRIVATE INSOLVENT CORPORATION continuing its business and using its franchise is liable for the franchise tax assessed while continuing the business." Vol. 3, Sec. 2941 (2nd. Ed.)

Many other cases might be cited in support of the obligation of a receiver to pay franchise privilege fees, based on the reasoning that *the court* has become the custodian of the *Corporate franchises,* and the receiver as an officer of the court in carrying on the business of the corporation, exercises said franchises. Most of these cases were summarized in an opinion of the Circuit Court of Appeals of the 8th Circuit, in Bright et al. v. State of Arkansas, (1918) 249 Fed. 950, where the court scrutinized the most important cases which had previously passed upon this question, and concluded:

"* * * * * by the great weight of modern authority, that courts of equity, operating the property and liquidating the debts of corporations, which would otherwise have been liable to pay such taxes, ought to direct the payment by their receivers of such

taxes as would have accrued during the time the receivers were actually operating the property."

It appears that in that case the State of Arkansas imposed an annual tax on the railroad company "for the privilege of exercising its franchise in the State of Arkansas." An order of the District Court requiring the receivers to pay these franchise taxes for two years of the receivership was appealed from. In affirming this order the court of appeals said:

> "In view of the uniform decisions of the federal courts upon the question here at issue, and of the great weight of authority in favor of the practice they have adopted, the conclusion is that receivers of the property of corporations, which would have been liable to pay taxes accruing during the receivership for the privilege of exercising their corporate powers, should be directed by the courts of equity controlling such receivers to pay such taxes as accrue while they are operating the property and before they surrender it to purchasers or others, and that there was no error in the order of the court below requiring the receivers to do so in the case at hand."

Additional decisions in support of this view are found in subsequent cases. Thus, in Providence Engineering Corporation v. Downey Shipbuilding Corp. 8 Fed. (2d) 304, exceptions were taken to the report of a special master in the matter of the claim of the State of New York for franchise taxes. The District Judge however sustained the exceptions and the portion of his opinion pertinent to this issue is as follows:

> "The learned master also found that the franchise tax for the period ending October 31, 1922, in the sum of $5,783.47 should be disallowed by reason of

the fact that no evidence was produced indicating that the receivers had carried on the corporation's business during this period. It is my opinion that this assessment is not subject to review in this court, for the reason hereinbefore set forth, and for the additional reason that the receivers had the right and did actually to some extent carry on the business of the corporation which thereby became liable to pay the tax. The corporation which was alleged to be solvent, had all the benefit to be derived from the right to conduct business."

To the same effect see Liberty Trust v. Gilliland, 279 Fed. 432.

In People v. Hopkins, (1927) 18 Fed. (2d) 731, the court passed upon a claim of the State of New York for privilege fees, asserted under Sections 209 and 214 of Article IX-A of the Tax Law, (Consolidated Laws c60), which, as we have previously pointed out, is identical with the Michigan law in that the imposition is there also on the privilege of doing business. The claim in that case centered around franchise taxes covering years long subsequent to the appointment of the receiver and the receiver pressed this fact upon the court in resisting the State's claim. The court ordered the taxes paid, however, saying:

"With respect to property taxes, it is perfectly obvious that the custody of the receiver should not give the property immunity from taxation. The Supreme Court has stated, with reference to bankruptcy, that there is nothing in the dedication of property to the payment of creditors which withdraws it from the necessity of protection by the state and municipality, or exempts it from its obligations to either. Swarts v. Hammer, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060. This reasoning is equally

apposite to a chancery receivership, and there is no lack of authority on the point. Coy v. Title Guarantee & Trust Co., 220 F. 90, L. R. A. 1915E, 211 (C.C.A. 9). With respect to franchise taxes, the result should be the same, and is, when the statute is construed as a tax upon the privilege of continued existence as a corporation. New Jersey v. Anderson, 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284. When the statute is construed as a tax upon the privilege of exercising the corporate franchise—that is, of continued operation of the corporate business—franchise taxes subsequent to the receivership are usually upheld if in fact the receiver has continued the business. Bright v. Arkansas, 249 F. 950 (C. C. A. 8); McFarland v. Hurley, 286 F. 365 (C. C. A. 5); Ohio v. Harris, 229 F. 892 (C. C. A. 6). Compare United States v. Whitridge, 231 U. S. 144, 34 S. Cot. 24, 58 L. Ed. 159."

"In New York v. Jersawit, supra, Mr. Justice Holmes, expressed the opinion that the tax levied under section 209 is a tax upon the privilege conferred, not upon the actual exercise of it. No decisions by the courts of the state of New York have been called to our attention, nor have we found any, which throw doubt upon the accuracy of this interpretation of the statute. See Cayuga & A. R. R. Co. v. Del. L. & W. R. R. Co., 215 App. Div. 429, 213 N. Y. S. 586 (construing section 182 similarly). Consequently we are of opinion that the taxes assessed against the corporation during the years in question were valid taxes, which must be paid by the receivers in priority to general debts."

A recent case on the subject is that of In re. Malko Milling and Lighting Company, 32 Fed. (2d) 825, which came to the District Court on exceptions to the allowance of the referee on the claims of certain creditors. The Malko Company went into the hands of receivers in the State Court in November, 1924. In the latter part of

January, 1925, a petition in bankruptcy was filed against the company and an adjudication followed in the same month. The trustee in bankruptcy was appointed in March. The State of Maryland asserted a claim for franchise taxes, payable on the first day of September on the capital stock outstanding on the first day of the preceding January. The trustees resisted the payment of the franchise tax on the ground that the tax was not levied on property but was in the nature of a license fee for the right to continue to exercise the privilege conferred upon it by the State and that since the receivership in November, 1924, there was in realty no corporate existence. The following is the opinion of the court:

> "The court finds that the trustee's contention is unsound. Although it is true that the tax did not accrue until after the state receivership, this receivership did not in law terminate the corporate existence. * * * * The tax is laid on the right 'to be a corporation'; that is, a tax upon the right conferred, not upon the actual exercise of it, regardless of what may be the reason for the nonexercise."

The Supreme Court of Massachusetts in Collector of Taxes v. Bay State St. Railway Co. (1919), 234 Mass. Reports, p. 340, in discussing the result of the appointment of a receiver upon the corporate franchises, said:

> "The title to the property of the street railway company was not transferred to the receiver. He became its custodian, not its owner. He was the officer of the court making the appointment and his possession was the possession of the court. The purpose of his appointment was to conserve the property of the company. The nature of the property and assets of the company could be best preserved by its continued operation. His operation of it as a common carrier was in the exercise of the

rights and franchises of the street railway company. *Although he was not the agent of the company, he used all its privileges.* Property taxes still rightly would be assessed to the company. City National Bank v. Charles Baker Co., 180 Mass. 40. Harrison v. J. J. Warren Co., 183 Mass. 123. The corporation is not dissolved in form or in substance. Being a common carrier, its property is affected with a public interest. One object of the receivership of such a corporation is to enable it to continue the exercise of its corporate franchises and functions and to avert a suspension of their operation with the consequent inconvenience to the traveling public and loss of revenue and loss of good will, and the prevention of change of custom by the public as to their patronage of it. Property in the hands of a receiver is not withdrawn from taxation. Property taxes rightly are assessed against the company. It is the plain duty of the court to see that such taxes are paid. City National Bank v. Charles Baker Co., 180 Mass. 40. Harrison v. J. J. Warren Co., 183 Mass. 123. In re Tyler, 149 U. S. 164, 183, Kirkpatrick v. Board of Assessors, 28 Vroom, 53. Coy v. Title Guarantee & Trust Co., 135 C. C. A. 658. Since the *franchises* of the corporation *are exercised for the benefit of its creditors,* there is no reason or principle why excises based on such use of its franchise should not also be paid by the receiver. The authorities are to this effect. Central Trust Co. v. New York City & Northern Railroad, 110 N. Y. 250. State v. Sessions, 95 Kans. 272, 279. New York Terminal Co. v. Gaus, 204 N. Y. 512. Bright v. Arkansas, 162 C. C. A. 148; 249 Fed. Rep. 950. In re United States Car Co., 15 Dick. 514.

"There is nothing in the phraseology of said §§ 47, 48, 50 of Part III of the tax law which render them inapplicable to the facts here disclosed. The tax is assessed on the street railway company by express terms. The return containing the information on which the tax is to be levied must be made under oath by its president and treasurer. There is

no insuperable difficulty in this being done. These corporate officers must still be in existence. It is the duty of the receiver to furnish them the data on which to make the return. The words of those sections are used in a 'comprehensive sense sufficiently broad to include parties holding the relation to a corporation which receivers of a railroad corporation usually do.'" Wall v. Platt, 169 Mass. 398, 401. The decision in that case supports inferentially the conclusion here reached. It there was held that receivers of a railroad were liable to action under a statute holding 'every railroad corporation' responsible in damages for injuries resulting from 'fire communicated by its locomotive engines.'

"There is nothing in the pertinent sections of the statute which affords solid foundation for the contention that the appointment of a receiver makes any break in the period for which the tax is assessed. There has been no change in ownership. The purpose of the operation has been all the while the benefit of the street railway company and its creditors and the public. The same franchise of operation has been continuously exercised for the same ultimate property and public interests. The principles discussed and applied in Natick & Cochituate Street Railway v. Wellesley, 207 Mass. 514, are not apposite to the facts here disclosed.

"There are numerous cases which have held that a corporation in the hands of a receiver is not subject to a franchise tax. Those are cases, however, where the corporation has been prohibited by law or by injunction from exercising its franchises and the receiver is not using them, or the corporation is in process of liquidation. Commonwealth v. Lancaster Savings Bank, 123 Mass. 493. Greenfield Savings Bank v. Commonwealth, 211 Mass. 207. It was in this connection that it was said by Chief Justice Holmes in City National Bank v. Charles Baker Co., 180 Mass. 40, 43, that when a corporation was insolvent and in the hands of a receiver 'the franchise is not taxed.' Under such circumstances the mere

franchise to be a business corporation has under our tax laws no value which is made subject to taxation. Johnson v. Johnson Brothers. 108 Maine, 272. State v. Bradford Savings Bank, 71 Vt. 234. These cases have no pertinency to the facts here disclosed. *The decision in United States v. Whitridge, 231 U. S. 144, construed a different kind of a statute and is not of controlling significance on the facts here disclosed.*"

Whether or not a receiver in carrying on the business of a private corporation, exercises any of the franchises of a corporation was squarely raised, carefully considered and answered by the Supreme Court of Michigan, in June 1931, In re Detroit Properties Corporation, 254 Michigan 530, wherein the court said:

"On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise 'to do' passes to the control of the court. Detroit, etc., R. Co. v. Campbell, 140 Mich. 384; Grand Rapids Trust Co. v. Carpenter, 229 Mich. 491; United States v. Whitridge, supra.

"The receiver is the creature or officer of the court and is not an agent of the corporation. Face v. Hall, 183 Mich. 22. But when he is authorized to carry on the business of the corporation, his authority does not come wholly or solely from the equity powers or jurisdiction of the court. The grant of corporate powers is a legislative function. The court, out of its own powers, cannot confer them upon an individual. It could not authorize the receiver to conduct a business not within the corporate charter. The power of the court to authorize the receiver to continue the business of the corporation exists only because the court has become the custodian of the corporate franchises. In so authorizing, it merely directs the person who shall exercise powers belonging to the corporation by legislative grant.

"The receiver of a corporation, conducting its business takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions, and has the same powers for such purposes, while on the other hand, he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent." 14-A. C. J. p. 1005.

"So it follows that, in conducting the business under order of court, the receiver is exercising the franchise 'to do' of the corporation. Substantially all the above authorities sustaining the tax so hold. See, also, State v. Sessions, 95 Kan. 272, 278 (147 Pac. 789).

"The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid."

This ruling of the Supreme Court of Michigan, construing the state statute imposing the tax here under consideration, wherein the court fully and carefully considered every question raised in the Circuit Court of Appeals, we submit should be followed by Federal Courts. To hold otherwise would enable a corporation in the hands of a Federal receiver to escape the payment of said tax; while a corporation in the hands of a state receiver would be required to pay the same.

The court is familiar with the rule it has adopted and followed consistently, as aptly stated in 27 R. C. L. page 44:

"In the construction of local statutes the decision of a state court of last resort will govern the Federal Courts; although the same act may have received a different construction in other states."

This rule has been followed in giving effect to decisions of state courts involving taxation.

We appreciate that the Circuit Court of Appeals in the instant case has assigned as a reason why it did not

follow the decision of the court of last resort of this state, on the question here under consideration, that "No question of the construction of a state statute by the highest court of the state was there or is here involved." (R. 34). We cannot accede to this conclusion. The tax in question is purely statutory. Whether or not the tax is payable by a receiver depends upon the nature of the tax, which can only be determined by a construction of the particular statute. This court in United States vs. Whitridge, supra, in determining whether or not a receiver of a corporation should pay a corporate income tax, was required to construe the statute. Again the Circuit Court of Appeals in People vs. Hopkins, supra, in determining the liability of a receiver for a corporate privilege tax, construed the statute imposing said tax.

The Circuit Court of Appeals in the fore part of its opinion adopts in part the construction placed upon that statute by the Michigan Supreme Court. It did not give weight or consideration to the decision of the Michigan Supreme Court in Re G. H. Hammond Co., supra, where our court held the tax in question was payable, "regardless of whether the corporation does any business within the state."

Under Sec. 124 of the Judicial Code, the Federal receiver in the instant case was required "to manage and operate" the property of this corporation "according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

The full text of said section is as follows:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property

according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

We submit that under this statute, and under the order of the district court which provided for the payment of all taxes, that the receiver should pay the taxes herein claimed. It is conceded that the corporation was not dissolved until after it had sold its property in 1929, and therefore under the state decisions the tax is payable. All the assets of the corporation were taken over by the receiver, who has benefited by them, and a court of equity should therefore follow such assets and impress thereon the lien of the state.

These decisions impress us as supporting the rule that a receiver of a solvent corporation, by operating the corporate business, exercises some of the corporate franchises; that the court takes the franchises of the corporation into its custody for a time; that the franchise "to do" passes to the control of the court; that a court of chancery cannot authorize the receiver to conduct a business not within its corporate charter.

2.

THAT THE COURT WAS IN ERROR IN HOLDING THAT THE LIMITATION UPON THE POWER OF A RECEIVER TO TRANSACT ONLY CORPORATE BUSINESS ARISES SOLELY BY REASON OF THE IMPLIED CONTRACT BETWEEN THE STOCKHOLDERS AND THE CORPORATION, AND NOT FROM ANY DEPENDENCE BY THE COURT UPON THE GRANT OF THE POWERS ENUMERATED IN THE CHARTER.

The following is the rule regarding the origin of the powers of a receiver to carry on the business of a corporation:

> "The receiver of a corporation, conducting its business, takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions, and has the same powers for such purposes, while on the other hand, he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent." 14-a C. J., p. 1005.

The author of Corpus Juris cites the following case in support of this doctrine:

In Safford v. The People of the State of Illinois (1877) 85 Illinois Reports, page 559, the court was called upon to consider the violation of an injunction issued against a corporation which later passed into the hands of a federal receiver. In discussing the effect of the appointment with reference to the corporate powers, the court said:

> "When the receivers were appointed by the Federal court, there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. The agents appointed by the court to perform its duties and exercise its functions, are legally its agents, although they are under the direction of the court appointing them, within the limits of its charter. *The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter. The court does not, nor could it if attempted, enlarge or restrict the powers and duties conferred by the charter. When it appoints the receiver, the court assumes the management of the corporation under and in accordance*

with the charter, and is bound by its provisions to the same extent that are the directory, and the agents appointed by the court are required by it to act within the limits of the charter, and to perform all duties imposed thereby.''

In Louisville, New Albany, and Chicago Railroad Co. v. Cauble (1874) reported in 46 Indiana Reports, page 281, the court was called upon to pass upon service of process made after a receiver had been appointed. It said:

"The whole decree proceeds upon the theory that the appellant is a corporation created and existing under the laws of this State. The whole effect of the decree is, to take the custody, control, and management of such corporation out of the hands of the persons who were controlling and managing the same and to place the same into the custody and under the control and management of the receiver for a specified time and for a special purpose. The corporate existence of the appellant was left intact. *The corporate powers and franchises which had been exercised by the officers of the company were conferred for the time being upon the receiver. The power and authority of the receiver to manage and control the company and its operations depended upon its corporate existence. If that had been taken away, the power and authority of the receiver would have ceased and terminated, for no court, federal or state, can confer corporate powers and franchises upon an individual. Such powers can be created and conferred by the legislative department alone.''*

The Supreme Court of New York in New York Terminal Co. v. Gaus (1912), 204 New York Reports, p. 516, in discusing the powers of a receiver appointed to carry on the affairs of a corporation, said:

"Upon the question of what the receiver was operating, Judge Peckham observed that, in taking possession of the corporate property, and in operating it, he 'uses the franchise, which has been conferred by the State upon the company, and he uses it as an officer of the court, which is administering the affairs of the company, and through the court he acts as the company to the same extent pro hac vice as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, * * * the same franchise is being used and the road is operated under it by an officer of the court until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged,' etc. (p. 257). The authority of this decision was, quite lately, recognized and followed in People ex rel Joline v. Williams, (200 N. Y. 528)."

This is the rule adopted by the Supreme Court of Michigan In Re Detroit Properties Corporation, supra, and we submit is sound in principle. While it is true that the implied contract between the stockholders and the corporation prevents the receiver from exercising powers not expressly conferred by the Legislature, yet when a receiver is appointed to carry on the business of a corporation as was done in the instant case, the court thereby makes the receiver the agent of the corporation. The Court must of necessity be bound by the charter provisions. What the receiver does binds the corporation. If the receiver should undertake to exercise powers not conferred upon the corporation, the court of equity on proper application would immediately restrain the doing of such acts.

3.

That The Court Erred In Making a Distinction Between a Public Utility Corporation and a Private Corporation, Indicating That In The Case Of a

Public Utility Corporation a Receiver Would Be Liable For The Corporation Privilege Tax.

We fail to find where any court has made the distinction made by the Circuit Court of Appeals in the instant case, without regard to whether the private corporation was solvent or insolvent and without regard to whether the receiver had been appointed to carry on the business of the corporation or to wind up its affairs.

In Mather's Sons' Co.'s Case, 52 N. J. Eq. 607 (3 Atl. 321), the Supreme Court of New Jersey ruled that the receiver of the private corporation in question should pay the corporate privilege tax which accrued after the receiver was appointed. The court in that case called attention to the provisions of the local corporation act of that state and said:

> "Our corporation act contemplates two classes of insolvent corporations—(1) those of a public character, such as a canal, railroad or turnpike corporation, whose property and work are dependent upon the franchise and in whose continuance the public is interested, and (2) those which are mere private enterprises, incorporated merely to secure the franchise which enables the prosecution of a lawful business, and at the same time protects against individual liability and serves convenience in adjusting changes in the ownership of the capital invested."

The court in that case said that where the receiver was operating a public utility it was his duty to pay the tax. The court also said that in the case of private corporations the receiver should pay the franchise tax when "for any purpose in pursuance of the execution of his trust, he exercises the franchise of the company, and then he should pay as long as he uses the franchise."

The court ordered the receiver to pay the tax, saying:

> "Where the ordinary and usual business of the corporation is continued, as in the present instance, at a profit, in the name of the company, by the receiver, in the hope that the financial difficulties may be adjusted and the assets may be restored to the company, there can be little hesitation in concluding that it is the duty of the receiver to pay the tax while he continues the business."

In the case of Providence Engineering Corp. v. Downey Shipbuilding Corp., 8 Fed (2) 305, the distinction sought to be made between a public utility corporation and a private corporation was denied.

The Supreme Court of Michigan In Re Detroit Properties Corporation, supra, in holding that there was no distinction between a public utility corporation and a private corporation, said:

> "A private corporation obtains its power from the state, as does a public utility corporation, and if the receiver uses the franchise of the corporation when he carries on the business, there is no basis for the distinction claimed."

The distinction made by the Circuit Court of Appeals in the instant case, is not supported by the language of the state statute imposing this tax. The statute imposing this tax makes no distinction between a private corporation and a public utility corporation. Section 4 of the act above referred to imposing this tax expressly excepts "railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies" from the payment of said tax. This exception is made for the reason that the public utility corporations mentioned are

taxed in a special manner as provided by Section 5 of Article X of the Constitution of Michigan. By reason of said exception in the statute imposing said tax, it is clear that the legislature intended to impose said tax upon "all corporations", including certain public utility corporations not expressly excepted from the operation of said statute.

We fail to find any text writer who has made the distinction here claimed by the Circuit Court of Appeals.

Thompson in his work on corporation law, 3rd edition, Volume 4, page 765, states the rule as follows:

> "LIABILITY OF RECEIVER FOR FRANCHISE TAX. The corporation is liable though its property is in the hands of a receiver, or a trustee in bankruptcy conducting the corporation business. It follows that the receiver of a private insolvent incorporation, *continuing its business and using its franchise,* is liable for the franchise tax assessed while continuing the business. But where it is not the duty of the receiver to preserve the franchise and he does not in fact exercise the franchise, it has been held that he will not be obliged to pay any other franchise tax than that which was due at the time of his appointment, unless he realized from the profits of the company more than sufficient to pay its debts and the expenses of the receivership, in which event, before distributing to stockholders, it is his duty to pay all franchise taxes assessed subsequent to his appointment."

The author states the rule which has been followed by the courts in imposing a tax levied upon the privilege of exercising a corporate franchise, namely: BY CONTINUING THE BUSINESS HE EXERCISES THE CORPORATE FRANCHISE, and therefore is liable for the tax.

The reasoning of the Circuit Court of Appeals is that the franchise, the privilege of exercising of which is taxed, is such a franchise as is granted to a public utility. True this is one of the franchises granted, and in the case of a public utility the main franchise, but it is by no means the sole franchise granted and used by a corporation. The statute imposing this tax clearly recognizes that a corporation may possess many franchises, for it provides:

> "It is the intent of this section to impose the tax herein provided for upon *every corporation,* foreign or domestic, having the privilege of exercising CORPORATE FRANCHISES within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

In addition to the franchise granted to a corporation, namely: the right to engage in business as a corporation, the receiver may take charge of the business of subsidiary corporations whose stock is owned by the corporation of which he has been appointed receiver. Button v. Cities Fuel & Power Co., 300 Fed. 280.

Clark on Receivers, Vol. 1, page 959, states the rule as follows:

> "A distinction may properly be made between payment of a corporation tax imposed on an excise or privilege and a tax on property or upon income merely as income. When receivers proceed to wind up a business, and the former company is prohibited from transacting the business for which it was incorporated and thus deprived of the right to exercise its franchises to do business, then it has been held that such right is not taxable."

In the following cases the privilege tax was ordered paid by the receiver who was operating the business of a private corporation:

Liberty Trust Company v. Gililand, 279 Fed. 432;
Providence Engineering Corporation v. Downey Shipbuilding Corp. 8 Fed. (2nd) 304;
People v. Hopkins, 18 Fed. (2d) 731;
In re Malko Milling and Lighting Co., 32 Fed. (2d) 825.

We do not believe that the distinction made by the Circuit Court of Appeals, between a public utility corporation and a private corporation is sound. If a receiver is appointed to carry on the business of a solvent corporation, and he actually carries on such business, the tax should be paid by him, the same as a receiver who operates a railroad or other public utility.

4.

THAT THE COURT WAS IN ERROR IN QUOTING LANGUAGE TAKEN FROM UNITED STATES V. WHITRIDGE, 231 U. S. 144, IN SUPPORT OF ITS CONTENTION THAT THE RECEIVER WAS NOT LIABLE FOR THE PRIVILEGE TAX.

In the Whitridge case this court was considering a tax imposed upon "income" derived from carrying on a corporate business. It was not a tax required to be paid for the "privilege of exercising a franchise." Because it was an "income" tax, the court found

> "A reference to the language of the act is sufficient to show that it *does not in terms impose a tax upon corporate property or franchises as such,* nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect

to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income."

The Michigan statute does impose a tax on CORPORATE FRANCHISES AS SUCH. It imposes the tax upon the privilege of exercising the franchises.

The court further said:

"And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. *True, they may hold,* for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads, and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges."

and concluded by saying:

"* * * all considerations alike lead to the conclusion that the act of 1909 did not impose a tax upon the income derived from 'the management of corporate property by receivers, under such conditions as are here presented' ".

The court did not believe it was the legislative intention to impose an income tax on a corporation in the hands of a receiver where the corporation was handicapped by reason of the receivership and the statute

there in question was not clear. In this case the corporation was benefited by reason of the appointment of the receiver, and he was required to carry on the business of the corporation.

Because the court in that case said "True, they (receivers) may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence" the tax in question is payable by a receiver under the ruling of the Michigan Supreme Court to the effect that the privilege tax is payable by any corporation ORGANIZED under the laws of Michigan, regardless of whether it exercised its franchises or not.

The Whitridge case was considered by the Circuit Court of Appeals in People v. Hopkins, (1927) 18 Fed. (2d) 731, at which time the court held the receiver liable for the corporation privilege tax imposed under the laws of New York, which statute is nearly identical with the law of Michigan.

The Whitridge case was also before the Michigan Supreme Court In Re Detroit Properties Corporation, supra, and distinguished.

The Whitridge case was also considered by the District Court in the present case and readily distinguished. (R. 17)

It was cited and *distinguished* by the *Supreme* Court of Massachusetts in Collector of Taxes vs. Bay Street Railway, supra.

TAXES IN QUESTION ARE PAYABLE EVEN THOUGH THE RECEIVER DID NOT EXERCISE ANY OF THE CORPORATE FRANCHISES.

If this court should feel some hesitancy in holding, under the facts and circumstances in this case, that the

receiver in carrying on the business of said corporation actually exercised any of the corporate franchises, yet under the statute in question, and the decisions of the Michigan Supreme Court, the taxes in question should be paid by the receiver.

As heretofore stated, the tax in question under the decisions of the Michigan Supreme Court and as enforced in Michigan, is "imposed upon a corporation *organized*" under the laws of Michigan, regardless of whether the corporation does any business within the State. See G. H. Hammond Co., supra.

We call attention to the following report of Hon. William S. Sayres, Jr., Standing Master in Chancery in the United States District Court for the Eastern District of Michigan in the case of Butler Paper Company v. Franklin Press and Offset Company, dated August 21, 1930. In that case the receiver had been appointed to take over the property and assets and to continue the business of the corporation prior to the due date of the annual privilege fee (August 31, 1928). The tax in question in that case accrued subsequent to the appointment of the receiver and the Master held that the receiver was liable for the privilege fee due the State. The Master held that the corporation had not surrendered the privilege of exercising its franchise and that liability for the privilege fee continued during the receivership. Mr. Sayres' opinion is as follows:

> "It will be noted that the applicable language of the statute just quoted requires the payment of this annual fee not by corporations organized *and* doing business under the laws of the State of Michigan, but by 'every corporation organized *or* doing business' under such laws. This language is plain and positive. Its meaning is in no way ambiguous nor doubtful, and that meaning must be given full effect

according to the intention of the legislature thus clearly expressed. This has been recognized by the Michigan Supreme Court which so construed the statute in the case of In re G. H. Hammond Co., 246 Mich. 179, in which it used the following language:

"'It is apparent from the context of the statute itself that this provision was intended to apply to every corporation organized under the laws of this State. Section 4 of the act, in part, reads: 'Every corporation organized or doing business under the laws of this State * * * shall * * * for the privilege of exercising its franchise and of transacting its business within this State pay to the Secretary of State an annual fee,' etc. Michigan has seen fit to adopt legislation by which the annual privilege fee is imposed upon a corporation organized under its laws regardless of whether the corporation does any business within the State. * * *. The Michigan statute provides that every corporation (1) organized, or (2) doing business under the laws of this State shall pay excise tax. The appellant falls under the first subdivision as a corporation 'organized' under the laws of this State.'

"Even if, therefore, there would otherwise be doubt concerning the construction of this statute by this court, such doubt would be removed by that decision of the Michigan Supreme Court."

A tax of this nature was before the Supreme Court of Alabama, in State vs. Bradley (1922), 207 Alabama Reports 677, where the court said:

"The subject of the creator's imposition of this 'franchise tax' is the existence of the corporation, not the 'continued exercise of the corporate franchise.' K. C., M. & B. R. v. Stiles, 242 Ala. 138, 142, 62 South. 734, 735; Id., 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176. A domestic corporation not excepted by the Constitution cannot avoid or escape this 'franchise tax' by even complete corporate inactiv-

> ity. The nature and subject of the imposition of this 'franchise tax,' as defined in the Stiles Case, supra, discriminates the case under review from the act of Congress considered in United States v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159; the act there involved imposing the charge, an excise tax, upon the 'doing of business' by the corporation as measured by a described net income, an exaction materially different from Alabama's 'franchise tax', which, as stated, is imposed upon corporate existence, not corporate activity or exerted corporate function. K. C., M. & B. R. Co. v. Stiles, 182 Ala. 138, 142, 62 South. 734; Id., 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176."

Will a court permit a solvent corporation to transfer all its assets to a receiver who carries on the business of the corporation for the mutual benefit of creditors and stockholders, and avoid the payment of a franchise tax—or will the court follow the assets and order the holder therefore to pay the tax?

Clark on Receivers, Vol. 1, page 951 states the rule as follows:

> "Property in the hands of a receiver is in custodia legis, but it is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes if any exists by statute is superior to all other liens whatsoever except judicial costs. While a lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court."

The payment of taxes is generally classified as a cost of preservation. As a general rule, property in the hands of receivers should bear whatever tax burdens it would be subject to, in the hands of the owner or litigants. McFarland v. Hurley (1923) 286 Fed. 365.

Under the decisions heretofore cited including the decision of this court in the Whitridge case, we contend that in the case at bar the franchises of the Worden Grocer Company passed into the custody of the court upon the appointment of the receiver, who carried on the business of this solvent corporation for a period of upwards of 3½ years and by reason of said premises the court should order the payment of the taxes in question out of any funds in the hands of the receiver before other creditors have been paid in full, in accordance with the order of the district court found in page 19 of the record.

CONSIDERATION OF DECISIONS IN DISTRICT AND CIRCUIT COURTS OF APPEAL.

In Duryea v. American Woodworking Machine Co., 133 Fed. Rep. 329, decided by the District Court of New Jersey in 1904, the court held that a yearly license fee or tax on corporations, which accrued after the receiver was appointed, should be paid by the receiver.

See Davis v. Gray, 16 Wall. 203, 221 (21 L. Ed.) 447, where the court said—

> "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

In Conklin v. United States Shipbuilding Company, 148 Fed. 129, decided by the New Jersey District Court in 1906, the court held that—

> "The annual franchise tax imposed on corporations by the New Jersey Statute, which provided

> that such tax shall be a preferred debt in case of insolvency, is a valid preferred charge against the assets of an insolvent corporation being administered by a receiver of a court of equity within the State, whether State or Federal, so long as the corporation remains undissolved. * * *"

Coy v. Title Guaranty & Trust Co. (D. C.), 212 Fed. 520, decided in 1914, holds the receiver liable for taxes asessed against personal property while in the hands of a receiver. The court quoted with approval the language of Mr. Chief Justice Fuller, In re Tyler, 149 U. S. 164, 182, 13 Sup. Ct. 785, 790 (37 L. Ed. 689)—

> "Undoubtedly property so situated (in custodia legis) is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, * * *"

In the State of Ohio v. Harris, 229 Fed. Rep. 898, decided by the Circuit Court of Appeals in 1916, the State of Ohio intervened in a receivership case by petition for payment by the receiver of franchise fees exacted by an Ohio statute. The court construed the Ohio law as being a tax upon the actual doing of business, rather than upon the mere privilege of doing; as is the case under the Michigan law. Finding, as a matter of fact, that the receiver had not conducted the business, the petition of the State was denied; but not until the court had added the following significant statement—

> "When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could not do so if the receiver had dur-

ing the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchise. Central Trust Company v. New York, 250, 257, 18 N. E. 92, 1 L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham."

Bright et al. v. State of Arkansas, 249 Fed. 950, decided in 1918 by the Circuit Court of Appeals, 8th Circuit, the court held that the receiver of a railroad company should pay an annual privilege tax under a statute which exacted the tax, for the privilege of exercising its franchise. The court calls attention to the decision of the Supreme Court of the United States in United States v. Whitridge, supra, and states that the question of the payment of such taxes by a receiver has long been a subject of debate and of conflicting decisions. The court cites decisions from the Circuit Courts of Appeals, and concludes by saying—

"* * * by the great weight of modern authority, that courts of equity, operating the property and liquidating the debts of corporations which would otherwise have been liable to pay such taxes, ought to direct the payment by their receivers of such taxes as would have accrued during the time the receivers were actually operating the property."

See also the companion of Bright et al. v. State of Arkansas, 249 Fed. 953, which holds in favor of the payment of the tax.

In McFarland v. Harley, 286 Fed. 365, decided in 1923, the Circuit Court of Appeals held the receiver liable for a severance tax accruing after the receiver was appointed. The court held the tax payable, saying—

"They (the receivers) are custodians of the property for the benefit of the litigants, and the property in their hands should bear whatever tax burdens it would be subject to in the hands of the owners or litigants."

In People v. Hopkins, 18 Fed. (2nd) 731, decided in 1927, the Circuit Court of Appeals held that the receiver's custody of property of an insolvent estate, held not to give it immunity from liability for franchise taxes under the tax law of New York, Sections 209, 214; franchise taxes being construed as a tax on the privilege of continued existence as a corporation. The Circuit Court of Appeals then had before it the decision of this Court in the Whitridge case, which is relied upon by the Circuit Court of Appeals in the instant case. The court evidently felt that the Whitridge case was not controlling of the question then before the court, which involved the payment of a corporate privilege tax.

DECISION OF THE CIRCUIT COURT OF APPEALS DEPRIVES THE STATE OF ITS PRIOR LIEN FOR THE PAYMENT OF THIS TAX.

Under the decision of the Supreme Court of Michigan, In Re Detroit Properties Corporation, supra, this tax is payable by the receiver, and under the law of Michigan would be paid by the receiver as an expense of administering the estate. The decision of the Circuit Court of Appeals in the instant case does not give effect to this decision of the Michigan Supreme Court. We submit that the Federal courts should give effect to the rules of priority followed in state courts.

This doctrine was established in New York Trust Co. v. Island Oil & Transit Corp. (1926) 11 Fed. (2d) 699, (C. C. A.—2nd) where the court said:

> "The record suggests two questions; strictly speaking the order appealed from answered neither. They are: (1) Is the state of Virginia entitled to the tax as matter of law? (2) Is it expedient to pay the tax as an expense of administration? The order merely "authorized" the receivers to pay the tax; it affords no information as to why authorization was given.
>
> "(1). From the memorandum filed below, we are inclined to think that the learned judge considered it fair, or prudent, or 'equitable' to have the tax paid; he did not hold any legal duty to pay lay on the receivers.
>
> "If these receivers had been appointed by a national court sitting in Virginia, if the assets were in that state, and it had demanded as of right preferential payment of this tax, payment would have been due, if the law of Virginia so held. *The priority demanded would have been 'enforceable against the property in the hands of a receiver appointed by a federal court within the state.'* Marshall v. New York, 254 U. S. 380, at page 385, 41 S. Ct. 143, 145 (65 L. Ed. 315)."
>
> "The property in the hands of these receivers is 'equitably' creditors' money; it is only to be diminished before payment to creditors by legitimate and reasonably necessary expenses."

CONCLUSION.

In conclusion we submit that the Circuit Court of Appeals erred in its decision holding that the taxes in question should only be paid in case a surplus over indebtedness was payable by the receiver to stockholders, for and

on account of their stockholdings, and that the State may share in the distribution of assets only if and after other creditors and the expenses of the receivership are paid in full.

We submit that the order (R. 21) of the district court requiring the receiver to pay the taxes in question should be affirmed and that the decision of the Circuit Court of Appeals insofar as it conflicts with the decision of the District Court be reversed with costs to your petitioner.

Respectfully submitted,
PAUL W. VOORHIES,
Attorney General,

EDWARD A. BILITZKE,
Assistant Attorney General,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 598

PEOPLE OF THE STATE OF MICHIGAN By JOHN S. HAGGERTY, Secretary of State,

Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent:

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BENJAMIN P. MERRICK,
Counsel for Respondent.

(36,412)

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Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 598.

PEOPLE OF THE STATE OF MICHIGAN by JOHN S. HAGGERTY, Secretary of State, Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Opinion of Lower Court.

The decision of the Circuit Court of Appeals for the Sixth Circuit, review of which the petitioner seeks, was handed down October 8, 1931, in the case of *Michigan Trust Company* v. *People of State of Michigan,* 52 F. (2d) 842. The opinion appears in the record (R., 34).

II.

Jurisdiction.

We admit that the petition is authorized by Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat., 936, and that it is within the discretionary power of this court to issue the writ.

III.

Scope.

Inasmuch as the granting or denial of the petition is a matter of sound judicial discretion, we shall merely summarize herein our comments upon the petition and the brief in support thereof, and our reasons for suggesting that the petitioner's prayer should be denied.

The validity of the decision of the Circuit Court of Appeals for the Sixth Circuit is not properly before this court at this time; and hence we shall not now make reply to the argumentative attack upon that decision which is contained in the petitioner's brief (pp. 25-31).

IV.

Corrective Statement of the Case.

The only matter for the court's present consideration is whether, taking into consideration the nature of the question involved, the decision of the lower court and other judicial decisions alleged to be in conflict therewith, special and important reasons for granting the Writ of Certiorari may be said to exist (Par. 5 of Rule 38).

Reference to the first and last paragraphs of the opinion of the lower court (R., 34, 39) will disclose a concise statement of the controversy and of the decision reached. Those paragraphs constitute a more helpful statement of the case than is to be found either in the petition (pp. 1-3) or in the supporting brief (pp. 13-14) wherein counsel for the petitioner refer in needless detail to the original bill of complaint; erroneously mention, as though proven, an allegation of no materiality in the proceedings below, namely, solvency of the corporation in receivership; and becloud their statement with argument.

The question of law presented to the court below, and by it decided in the negative, was this: Did the Michigan Trust Company, as receiver of the property and business of Worden Grocer Company, a Michigan mercantile corporation, appointed by the District Court of the United States for the Western District of Michigan upon a creditor's bill, and operating the business of the corporation by authority of the appointing court, become liable to the State of Michigan for annual privilege fees imposed upon the corporation by Section 4 of Act No. 85, P. A. 1921, for "the privilege of exercising its franchise and of transacting its business" within the State, and accruing against the corporation subsequent to the date of the receiver's appointment?

It may be noted, although of secondary importance, that in remanding the case to the District Court, the Circuit Court of Appeals decreed that if there should be a surplus distributable to stockholders, that fund alone would be chargeable with the payment of the State's claim for franchise taxes (R., 37).

V.

Argument.

1. *Rationale of Decision, Review of Which is Sought.*

The court below (1) based its decision upon the principle of general law that the operating receiver of a private

corporation does not exercise the corporate franchise; and (2) found sanction for that principle in the decision of this court in *United States* v. *Whitridge*, 231 U. S. 144, a case which arose under the Corporation Excise Tax Law of 1909, Sec. 38, Act of Aug. 5, 1909, 36 Stat., 112. Divergency of view as to the applicability of the stated principle in cases involving the question of state franchise tax liability of corporate receivers lies at the bottom of such conflict as may exist between judicial decisions in those cases. This is conspicuously illustrated (1) in the opinion handed down by the Michigan Supreme Court on June 1, 1931, in the case of *In re Detroit Properties Corporation*, 254 Mich. 524 (Petitioner's Brief, 32, 37-38), and (2) in the opinion of the lower court in the case at bar (R., 38-39). If this court concurs with the view of the lower court (R., 39) that the rationale of the decision in *United States* v. *Whitridge, supra*, applies in all its force to the present case, we suggest that the petition for the writ may properly be denied.

2. *Conflict Between Circuit Courts of Appeal.*

In citing in their petition (p. 4) and in their supporting brief (p. 10) five decisions of Circuit Courts of Appeal asserted to be in conflict with the decision of the court below, counsel overstate the extent of such conflict. Of the cases cited, the only one which is squarely in conflict with the decision of the court below is *People* v. *Hopkins*, 18 F. (2d) 731 (C. C. A. 2). Counsel's citation of *Ohio* v. *Harris*, 229 F. 892 (C. C. A. 6), is unfortunate (1) because the point decided in that case was that a non-operating receiver of an Ohio corporation was not liable for the recurrent state franchise tax accruing after the receiver's appointment; and (2) because the dictum in that case, to the effect that the receiver would have been liable had he operated the business, was expressly disapproved by the same court in the opinion rendered in the case review of which is now sought (R., 39). The other cases cited by counsel to show con-

flict between the Circuit Courts of Appeal, *Bright, et al.* v. *State of Arkansas,* 249 F. 950 (C. C. A. 8), and *McFarland, et al.* v. *Hurley, et al.,* 286 F. 365 (C. C. A. 5), were effectively distinguished by the court below in its opinion (R., 36-37).

It follows that counsel exaggerate in stating in their brief (pp. 11-12) that the court below admitted the "conflict of authority, by calling attention to the cases decided by the other Circuit Courts of Appeal" and that it dismissed them with the statement that they were not sound in reason and that the court felt under no obligation to follow them. The court will observe from the passage to which counsel refer, in the opinion of the lower court (R., 37-38), that aside from its own dictum in *Ohio* v. *Harris, supra,* (expressly disapproved in the opinion) the only decision of a Circuit Court of Appeals which the lower court considered comparable was *People* v. *Hopkins, supra,* which it disapproved and declined to follow.

3. *Conflict Between the Lower Court and the Michigan Supreme Court.*

That there is opposition between the decision of the court below and the earlier decision of the Michigan Supreme Court in the case of *In re Detroit Properties Corporation, supra,* must be admitted. The conflict, however, was not accidental, for the decision of the state court, although handed down subsequent to the argument and submission of the instant case in the court below, was considered at length and disapproved by the latter in its opinion (R., 34-36).

The divergence between the two decisions is upon a question of law of general application. The decision of the court below was not "a decision of an important question of local law" as counsel say in their brief (p. 10); rather was it a decision in which the court applied, to facts local to Michigan, a general principle of law which it deemed sound.

Again, it is not accurate to say, as counsel do in the brief (pp. 10-11), that the instant case involved "the right to collect taxes imposed under the laws of the State of Michigan". The tax was one admittedly imposed upon the corporation, for certain corporate privileges. The statute contained no reference to corporate receivers. The decision of the court below did not bring in question the right of the state to collect from any corporation the tax imposed upon it. Being of opinion, as previously pointed out, that the respondent receiver was not exercising the franchise, i. e. the thing taxed, the lower court held that the receiver was not subject to the tax thereon.

Finally, the lower court cannot properly be charged with having reached its decision by means of a construction of the statute at variance with that of the Michigan Supreme Court (Petitioner's Brief, 29). The lower court was quite correct in saying (R., 34, note) that no question of construction of a state statute by the highest court of the state was involved. Counsel are manifestly in error in their contention (Brief, 29) that the tax liability of the receiver depended on the nature of the tax, which they assert could only be determined by a construction of the statute. The lower court in fact adopted the view of the state court, expressed in *In re Detroit Properties Corporation, supra,* as well as in many earlier Michigan cases therein cited, that the tax is not a tax upon property but an excise upon the privilege (R., 34). The tax liability of the receiver did not depend upon a particular construction of the statute; it depended upon whether, as a matter of law, the receiver exercised and enjoyed the thing taxed. In reaching conflicting conclusions, neither court resorted to interpretation of the meaning of the statute, beyond that which is always necessary if the meaning of printed words is to be grasped. The case presents no basis whatever for invoking the rule of deference by Federal courts to state courts of last resort, in the interpretation of local statutes.

4. *No Important Question of Federal Law.*

The contention of counsel (Brief, 12) that the case at bar presents an important question of Federal law, not hitherto determined by this court, we deny. If by a "question of Federal law" they mean a question arising under the Constitution or laws of the United States, manifestly no such question is here involved. If they mean that this court has not passed upon the question of general law presented, as applicable to receivers of Federal courts, we answer (1) that if so, that fact alone would not justify the issuance of the writ unless the well-established limitations upon the right of review by certiorari are to be greatly relaxed, and (2) that in truth the basic principle here involved was settled by this court in *United States* v. *Whitridge, supra.*

5. *Conclusion.*

For the foregoing reasons we suggest that the petitioner has not shown special or important grounds for the granting of the Writ of Certiorari and that the petition should be denied.

Respectfully submitted,

BENJAMIN P. MERRICK,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 598

PEOPLE OF THE STATE OF MICHIGAN By JOHN S. HAGGERTY, Secretary of State,

Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent.

BRIEF FOR RESPONDENT, UPON THE MERITS.

BENJAMIN P. MERRICK,
Counsel for Respondent.

(36,412)

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MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent.

BRIEF FOR RESPONDENT, UPON THE MERITS.

I.

Reference to Opinion of Lower Court.

The decision of the Circuit Court of Appeals for the Sixth Circuit, which is before this court upon writ of certiorari granted February 15, 1932, was handed down October 8, 1931, in the case of *Michigan Trust Company* v. *People of State of Michigan*, 52 F. (2d) 842. The opinion appears in the record (R., 34). On behalf of the respondent we beg leave to submit this brief upon the merits, superseding the brief filed in opposition to the petition for the writ.

II.

Statement of the Case.

The question to be determined is whether the court below erred in holding that the respondent, as receiver of Worden Grocer Company, a Michigan mercantile corporation, appointed by the District Court of the United States for the Western District of Michigan upon a creditor's bill, and operating the business of the corporation by authority of the appointing court, was not liable to the State of Michigan for annual privilege fees imposed upon the corporation by Section 4 of Act No. 85, P. A. 1921, for "the privilege of exercising its franchise and of transacting its business" within the state, and accruing against the corporation subsequent to the date of the receiver's appointment.

Worden Grocer Company, incorporated in 1895 under the general statute of Michigan governing the organization of manufacturing and mercantile corporations, engaged in the wholesale grocery business in Michigan from organization until appointment of the receiver on February 9, 1926 (R., 13, 20).

The order of appointment (R., 10-12), among other things, (1) appointed the respondent as receiver of the corporation and of all its property; (2) authorized the receiver "to carry on the business now carried on by Worden Grocer Company, and to operate and manage its property and business;" (3) authorized, but did not require, the receiver "to pay all taxes and assessments levied upon the property and assets of said company;" and (4) enjoined and restrained the corporation, its officers, servants and agents, from "interfering with said receiver or its operation and conduct of the business."

Under this order the receiver took possession of the property and business of the corporation, and managed and operated the same from date of appointment until Decem-

ber 30, 1929, when the District Court confirmed the sale of the mercantile assets of the corporation (R., 20).

At the time the receiver was appointed the corporation was subject to the general corporation laws of the State of Michigan, including the General Corporation Act (Act No. 84, P. A. 1921) and the Corporation Fee Act (Act No. 85, P. A. 1921), by which statutes the corporation was required to file an annual report with the Secretary of State and to accompany such report with payment of an annual fee, computed upon paid-up capital and surplus (without diminution for impairment of capital), "for the privilege of exercising its franchise and of transacting its business" within the state of Michigan.

The annual privilege fees accruing against the corporation subsequent to the appointment of the receiver were not paid; and upon August 8, 1930, the District Court, upon petition of the State, made a final order directing the receiver to pay them for the years 1926 to 1929 inclusive, in an amount stipulated by counsel. From this order the respondent appealed to the Circuit Court of Appeals, which heard argument upon January 9, 1931, and on October 8, 1931, handed down its decision reversing the decree of the District Court and remanding the cause, with direction that if it should appear that a surplus over indebtedness was distributable to stockholders of the corporation, that fund alone would be chargeable with the payment of the State's claim for franchise taxes (R., 39).

On June 1, 1931, while the Circuit Court of Appeals held the case under advisement, the Supreme Court of Michigan, in the case of *In re Detroit Properties Corporation*, 254 Mich. 523, handed down a decision in which it held the receiver of a Michigan corporation, appointed by a court of that state, liable for the privilege fees imposed upon the corporation by the Corporation Fee Act hereinbefore mentioned, and accruing during the receivership.

From the opinion in that case (pp. 32-39 of the brief in support of the petition herein) it appears that the cause

was submitted April 7, 1931, and that the court was informed by counsel that the District Court of the United States for the Western District of Michigan had sustained the tax under similar conditions. So far as the opinion discloses, no mention was made of the previous submission and pendency, in the Circuit Court of Appeals, of an appeal from the District Court in the case alluded to, which is the case now here for review.

III.

Relevant Michigan Statutes.

In order to avoid repetition and uncertainty, we beg leave to refer, for a correct quotation of the statutes upon which the State's claim is based, to pages 6 and 7 of the Brief of the People.

We beg leave also to refer to the statutes which are quoted upon pages 8 and 9 of that brief, although they are of secondary importance.

Supplementing the foregoing, we set forth below certain other Michigan statutes to which we shall have occasion to refer in the argument.

1. Section 5 of the Corporation Fee Act (Act No. 85, P. A. 1921) has provided, during the period involved, in part as follows:

> "In the case of computing the franchise and privilege fees prescribed by sections three (3) and four (4) of this act, respectively, both as to domestic and foreign corporations, such computation shall be made upon the corporation's property, both tangible and intangible, owned or used in Michigan in the ratio that such property bears to the entire property of the corporation, and such ratio shall be applied by the secretary of state to determine the amount of the authorized capital stock owned or used in Michigan, and to determine what portion of the corporation's paid-up capital and surplus, severally, are

owned or used in Michigan. The term "surplus" as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case either as (*sic*) domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the privilege fee thereon, by reason of any impairment of the same. . . .." (C. L. 1929, Sec. 10143).

2. Among those provisions of Chapter XL of the Judicature Act of 1915 governing the voluntary dissolution of corporations by proceedings in chancery, are the following:

"Sec. 4. . . . Upon said hearing before the court or upon the coming in of the report of the circuit court commissioner, if it shall appear to the court that such corporation is insolvent or that for any reason a dissolution thereof will be beneficial to the stockholders and not injurious to the public interest, a decree shall be entered dissolving such corporation and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease. * * *."

"Sec. 6. Upon giving bond and qualifying, as the court may direct, such permanent receiver shall be vested with all the estate, real and personal, of such corporation and shall be trustee thereof for the benefit of its creditors and stockholders, and shall have all the powers, authority and remedies of an assignee for an insolvent debtor, and also the power to continue the business of such corporation for such period not exceeding one (1) year as the court shall permit; * * *." (C. L. 1929, Secs. 15313, 15315).

IV.

Summary of Respondent's Argument.

1. At no time has the asserted solvency of the corporation been proven or material.

2. *In re Detroit Properties Corporation*, 254 Mich. 523, is not controlling here.

a. Interpretation of a Michigan statute is not involved.
b. The basic question is one of general, not local, law.
c. The relation of a federal court receiver to taxable corporate franchises is not a matter for indirect determination by a state court, in an unrelated case affecting a state court receiver.
d. The state court decision was not only a case of first impression, but was both submitted and decided while the court below had the instant case under advisement.

3. Upon the merits, the court below did not err in relieving the respondent, as receiver, from liability for the annual corporation privilege taxes which accrued after the receiver's appointment.

a. The court below followed Michigan decisions declaring the tax to be an excise upon the privilege of doing business in corporate form.
b. Whether a receiver, by operating the business, uses the corporate franchises was recognized, not only by the court below but also by the state court, as the proper criterion of tax liability.
c. The theory that the functional powers of a mercantile corporation are separable from the general franchise by which it exists, is unsound.
d. A mercantile corporation is not divested of its franchises by a receivership of its property and assets.
e. The theory that the managing receiver of a mercantile corporation partially derives his powers from the franchise of the corporation is unsound.
f. The court below was correct in holding that the receiver did not exercise the corporate franchises, and in holding applicable to the case the rationale of the decision in *United States* v. *Whitridge*, 231 U. S. 144.
g. Other decisions of this Court in principle support the exemption of the respondent, as receiver, from a purely implied tax liability.

V.

Argument.

1.

The suggestion of corporate solvency which permeates the petitioner's brief (pp. 2, 4, 12, 46, 47) has no basis in fact and injects a confusing and immaterial factor into the case. True, the formal averment in the bill, on information and belief, that the defendant Worden Grocer Company was solvent (R., 4) was admitted by the answer (R., 8). The latter likewise admitted every other allegation in the bill which, in its entirety, correctly pictured a corporation in a highly precarious financial condition. That the fears expressed in the bill, rather than its hopes, were justified is sufficiently shown in the record (1) by the opinion of the District Judge (R., 18) and (2) by the payment of a dividend of 25% to common creditors after liquidation of the defendant's mercantile assets (R., 20). It may be permissible to refer to the case of *Vandenbosch* v. *Michigan Trust Co.*, 35 F. (2d) 643 (C. C. A. 6), a case arising out of the same receivership, wherein unpaid holders of preferred stock of Worden Grocer Company which matured over a year prior to the receivership sought strenuously, albeit unsuccessfully; to gain parity with the creditors, thus showing how insecure those stockholders felt, as stockholders.

We realize that the fact of solvency or insolvency is quite immaterial. It was not a factor in the decision of either of the lower courts. We have touched upon it only because of the prejudicial manner in which a wholly fanciful solvency is utilized in the petitioner's brief, as on page 46, where the question is asked:

> "Will a court permit a solvent corporation to transfer all its assets to a receiver who carries on the business of the corporation for the mutual benefit of creditors and stockholders, and avoid the payment of a franchise tax—or will the court follow the

assets and order the holder therefore (*sic*) to pay the tax?"

Passing over the false allusion to a voluntary transfer of assets and ignoring the improper innuendo of fraud, we suggest that solvency of the corporation is no determinant of the question at bar because, under the Michigan Corporation Fee Act, an insolvent corporation with totally impaired capital is no less subject to the tax than is a solvent corporation (Par. 1, p. 4, *supra*); and hence the tax liability of a receiver of neither would depend upon insolvency or solvency.

2.

In re Detroit Properties Corporation, 254 Mich. 523, is not controlling here. Although the petitioner's brief does not treat the point as one of major importance, we think a frank discussion of it by us is called for.

As stated by the Michigan Supreme Court in the case cited, it was one of first impression. The decision, handed down while the court below held the instant case under advisement, was considered by the court below, but not followed. The state court decided that a state court receiver of a Michigan corporation was liable for the annual privilege fee accruing against the corporation during receivership. The rationale of the decision may be summarized thus: (1) the tax is upon the privilege of exercising the corporate franchise "to do"; (2) that franchise passed to the receiver and was used by him; (3) the receiver is therefore subject to the tax.

Admittedly, the case cannot be reconciled with the decision of the lower court here under review.

a.

The state court decision was not based upon an interpretation of the Corporation Fee Act. This is apparent from the opinion in the case, which confirms the correctness

of the view expressed upon the point by Judge Hickenlooper in the note to his opinion in the court below (R., 34). The court will observe that Judge Hickenlooper expressly adopted the view of the Michigan Supreme Court (which was based upon several of its earlier decisions) that the tax is not a property tax, but an excise upon the privilege of doing business in corporate form (R., 34). The previous construction of the statute was adopted by both courts and added to by neither.

The language of the statute, which omits all reference to corporate receivers, is clear and unambiguous, leaving no room for the function of judicial interpretation. The receiver may be said to be "*casus omissus*".

In not treating the question as one of statutory interpretation, the Michigan Supreme Court was no doubt influenced by its venerable rule, consistently adhered to, that where the wording of an Act is plain the legislature must be held to have intended the meaning which it has expressed and that in such cases there is no room for construction or expansion of meaning by judicial interpretation.

In *Twitchell* v. *Blodgett*, 13 Mich. 127, 167, the court held that the Act of February 5, 1864, conferring upon Michigan soldiers engaged in the Civil War the right to vote in the field, was in violation of the requirement of the State constitution that, to be entitled to vote, an elector must have resided in the township, in which he offered to vote, ten days next preceding the election. In his opinion Judge Cooley said:

> "There are certain well-settled rules for the construction of statutes, which no Court can safely disregard. Where the statute is plain and unambiguous in its terms, the Courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern."

One of the many questions raised in *Dodge* v. *Ford Motor Company,* 204 Mich. 459, 495, was whether the limitation upon capital stock contained in the General Corporation Law was to be construed as also limiting capital assets. Upon this point the court said:

> "There is no apparent reason for entering upon the task of interpreting or construing language which is self-interpreting, which has a clear, reasonable meaning. * * * We are not called upon to find a reason for the policy of limiting the capital stock or for the failure to also limit the value of the assets which may at any time be employed in the corporate business. We may assume a legislative reason, but may not assume that, because a possible reason may be given for a further limitation, such further limitation must be implied."

In the recent case of *City of Detroit* v. *Township of Redford,* 253 Mich. 453, 455-57, the disposition of the property of a municipality, part of whose territory was annexed to another municipality, was an issue. The statute provided expressly for the division of *real* property in such cases but made no provision with respect to *personal* property. In declining to extend the statute to include personal property, the court said:

> "There is no ambiguity in the foregoing provision and its plain meaning can not be altered by application of rules of construction. The statute obviously and plainly provides for a division of real property and of real property only * * *. We have no right to strike this limitation out of the statute."

To the same effect are the following Michigan cases:

Barstow v. *Smith,* Walk. Ch. (Mich.) 394, 395-6;
Bidwell v. *Whitaker,* 1 Mich. 469, 479;
Leoni v. *Taylor,* 20 Mich. 148, 154-55;
Lane v. *Ruhl,* 103 Mich. 38, 42;
People v. *Crucible Steel Company,* 150 Mich. 563, 567;

MacQueen v. *Port Huron*, 194 Mich. 328, 342;
Crary v. *Marquette Circ. J.*, 197 Mich. 452, 454;
In re Merrill, 200 Mich. 244, 248.

The same rule is thoroughly established by the decisions of this court.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, 36;
Eidman v. *Martinez*, 184 U. S. 578;
Gould v. *Gould*, 245 U. S. 151, 153;
United States v. *Weitzel*, 246 U. S. 533, 543;
Smietanka v. *First Trust and Savings Bank*, 257 U. S. 602;
United States v. *Merriam*, 263 U. S. 179;
Hecht v. *Malley*, 265 U. S. 144;
Ebert v. *Poston*, 266 U. S. 548, 554;
Reinecke v. *Gardner*, 277 U. S. 239;
Crooks v. *Harrelson*, 282 U. S. 55, 60, 61.

b.

The undeniable conflict between the court below and the Michigan Supreme Court was solely upon the fundamental question of law: Does the receiver of a corporation, in operating the business thereof, exercise its franchises? In basing its decision upon an affirmative answer to this question the state court manifestly took a position upon several questions of law not at all local in character. The exact nature of corporate functional powers; the effect thereon of the appointment of a managing receiver; and the source of a receiver's power to operate the business—surely these are topics the correct analysis of which requires the application of quite general principles of law. Upon those principles the solution of the problem at bar depends; and in the determination of what are the correct principles applicable, this court, by its own decisions, is free (as was the court below) to exercise independent judgment.

Swift v. *Tyson*, 16 Pet. 1;

Olcott v. *Fond du Lac Co.*, 16 Wall. 678;
Burgess v. *Seligman*, 107 U. S. 20;
Baltimore etc. R. R. Co. v. *Baugh*, 149 U. S. 368;
Kuhn v. *Fairmont Co.*, 215 U. S. 349;
Black & White, etc. Co. v. *Brown & Yellow, etc. Co.*, 276 U. S. 518;
Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

Although a state statute may be involved, the rule still applies if, without construction of the statute, the state court determines the effect thereof by means of what it conceives to be correct general principles of law.

Ryan v. *Staples*, 76 F. 721 (C. C. A. 8); certiorari denied, 166 U. S. 720;
Ottumwa v. *City Water Supply Co.*, 119 F. 315 (C. C. A. 8);
Casserleigh v. *Wood*, 119 F. 308 (C. C. A. 8).

c.

In determining the relationship of the respondent, as a federal court receiver, to the franchise privileges of the corporation, this court is not precluded from independent judgment by a decision of the state court in an unrelated case affecting a state court receivership.

Porter v. *Sabin*, 149 U. S. 473.

Had the State of Michigan instituted suit upon its claim against the respondent in a state court, the case would have been removable to the District Court under Judicial Code, Sec. 33.

Barnette v. *Wells Fargo, etc. Bank*, 270 U. S. 438.

The Michigan Supreme Court, despite the statute permitting suits against federal receivers without previous leave of court (Judicial Code, Sec. 66), has declined to sus-

tain an injunction restraining a federal court receiver of a telephone company from raising rates.

Rogers v. *Chippewa Circuit Judge,* 135 Mich. 79.

The same court has twice held that a federal court receiver of a railroad is not subject to action for recovery of penalties under statutes of the State.

Robinson v. *Harmon,* 157 Mich. 272;
People v. *Blair,* 183 Mich. 130.

We believe that these Michigan cases, particularly *Rogers* v. *Chippewa Circuit Judge, supra,* justify the faith that had the State sought to recover in a state court the taxes here in question, the Michigan Supreme Court would have declined to sustain the action. If we are sound in this, may it not be said that what the State court would not decide in a direct action it should not be permitted to decide by indirection, through deference to its judgment in an unrelated case? The Michigan Supreme Court has not yet attempted to adjudicate the franchise tax liability of a federal court receiver of a Michigan corporation.

d.

The state court decision was not only a case of first impression with that court but was both submitted and decided while the court below had the instant case under advisement. The latter court did not challenge the validity of any long-established rule of Michigan law. Having before it for adjudication the rights and duties of a federal court receiver under a Michigan tax statute which made no reference to receivers the court below chose to rest its decision upon a principle of general applicability announced by this court in *United States* v. *Whitridge* 231 U. S. 144, 149, rather than to follow the state court's rejection of that principle in a case of first impression, relating only to a state court receiver and decided five months after the case

at bar was submitted below. In thus exercising independent judgment we think the lower court acted in harmony with decisions of this court.

Pease v. *Peck,* 18 How. 595;
Carroll County v. *Smith,* 111 U. S. 556.

3.

Upon the merits, the court below did not err in relieving the respondent, as receiver, from liability for the annual corporation privilege fees which accrued after the receiver's appointment.

a.

The nature of the tax is not in dispute, for the court below followed Michigan decisions declaring the tax is not a property tax but is an excise upon the right to exercise corporate functions.

In the first case to characterize the tax, *Union Steam Pump Sales Co.* v. *Secretary of State,* 216 Mich. 261, in which the constitutionality of the statute was upheld, it was necessary for the court, for reasons peculiar to the Michigan constitution, to differentiate between the pre-existing franchise fee, payable on organization, and the recurrent privilege fee, if the then new statute imposing the latter was to be upheld. The court accordingly held the one to be a tax upon the franchise "to be", and the other a tax upon the franchise "to do", a distinction sound enough for tax-classification purposes but one which, as we shall point out below, leads to fallacious conclusions when applied in the analysis of corporate functional powers and the relation of a managing receiver thereto.

b.

Whether a receiver, by operating the business, uses the corporate franchises, was recognized not only by the court below but also by the state court, as the proper criterion of tax liability.

As the court below said in its opinion:

> "This is manifestly the proper criterion to apply. If he (the receiver) did, liability to the tax would be the liability of the receiver and the fee must be paid by him. If he did not use any of the franchises of the corporation it is extremely difficult, if not impossible, to justify the imposition of a tax against the receiver as such." (R., 35).

And in the *Detroit Properties Corporation* case, *supra*, the Michigan Supreme Court, near the end of its opinion, said:

> "So it follows that, in conducting the business under order of court, the receiver is exercising the franchise 'to do' of the corporation. * * * The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid." (Petitioner's Original Brief, 39).

It is important to note that the state court did not go so far as to adopt the test of mere continued corporate existence, which is the extreme view of a few courts, expressed in cases considered and rejected by the court below not only in the instant case but also, in 1916, in *State of Ohio* v. *Harris*, 229 Fed. 892 (C. C. A. 6). That case is still the law of the Sixth Circuit. The issue at this bar is narrowed to the question whether the *dictum* in that case, expressly over-ruled in the decision here under review, but in effect followed by the state court in the *Detroit Properties Corporation* case, was sound or unsound.

c.

The theory that the functional powers of a mercantile corporation are separable from the general franchise by which it exists, is unsound. In thus holding, the court below, not without courage, made a refreshing return to principles of corporation law long since established but frequently forgotten; and refused further to perpetuate the superficial thinking which has marked the subject of the

taxation of corporate franchises in cases of receiverships. As intimated in the opinion below, decisions justifiably subjecting the receiver of a public utility corporation to a tax upon the special privileges which he must perforce exercise have been applied to cases of mercantile corporations in receivership, without regard to essential franchise differences. Again, from the admitted premise that (1) the initial grant of a general corporate franchise and (2) the privilege of its subsequent exercise may be separately taxed, the fallacious conclusion has been drawn that *therefore* the privileges are exercised by a receiver who conducts the business.

The comparatively modern development of specific taxation of corporations by means of a tax upon their functional activities, or powers, seems to have thrown into shadow the truth, formerly well-recognized, that the capacity of a corporation to function is inherent in its capacity to exist. Its powers of action, as a corporation, can no more be detached from the body and passed to another than can the physical powers or civil capacity of a natural person. And merely because the corporate functional powers, or the tangible business fruits thereof, may be subjected to specific taxation, it by no means follows that those powers are indispensable to one who, like the receiver of a mercantile corporation, succeeds to the operation of the business.

The court below saw clearly to the root of the matter, as shown by the following vital passage in the opinion:

> "Relying upon the supposed distinction between a tax upon the 'privilege' of exercising the franchise 'to do', and a tax upon the franchise 'to be', the opinion in *In re Detroit Properties Corporation* concludes that inasmuch as a receiver normally may conduct only such business as the corporation was theretofore authorized by charter to transact, such receiver is exercising the corporation's franchise 'to do'. Compare, also, *In the Matter of George Mather's Sons Co.*, 52 N. J. Eq. 607. This would seem a *non sequitur* where the corporation has been engaged in purely mercantile pursuits 'for fran-

> chises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right'. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595. A receiver 'is a mere arm of the court appointing him.' *Converse* v. *Hamilton,* 224 U. S. 243, 257. 'Immediately upon such appointment and after qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature.' *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 370; *Booth* v. *Clark,* 17 How. 322, 337. Not only, in the case of mercantile corporations, is the franchise 'to do' inseparable from the franchise 'to be', and necessarily implied from a grant of the latter franchise, and the distinction therefore somewhat vague, but no good reason appears in such a case why the receiver may not perform, under direction of the court, any act which might be performed by any other citizen, in total disregard of the corporate capacity of the former possessor of the property, and without any reliance whatever upon its franchises."

We submit that those powers which, together, constitute the functional capacity of a mercantile corporation are not, in any accurate sense, franchises at all. They are not intrinsically unique; they become peculiar only when conferred upon the corporation as accessory attributes without which it could not function as a living organism; and they are indispensable only to the corporation *as such.*

In *Slee* v. *Broom,* 19 Johns. (N. Y.) 456, 473-474, a case dealing with what was perhaps the first general law in America governing the formation of business corporations (N. Y. Act of 1811), the court said:

> "The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was, in effect, to facilitate the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating

> and becoming incorporated, for the purposes held out in the Act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted.
>
> "The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them consists in a capacity to manage the affairs of the institution, by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscription."

In *Warner* v. *Beers,* 23 Wendell (N. Y.) 103, 145, in discussing an early general banking law, Verplanck, Senator, said:

> "There are several very useful and beneficial accessory powers, or attributes very often accompanying corporate privileges, especially in moneyed corporations * * *. Such added powers, however valuable, are merely accessory. They do not in themselves alone confer a corporate character, and may be enjoyed by unincorporated individuals."

Turning to some early Michigan cases, we find that in *Thompson* v. *Waters,* 25 Mich. 214, Christiancy, J., said at pages 223-224:

> "The mere right of a corporation to purchase and sell property, not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in states other than those of its creation."

In the same case, another learned jurist, Campbell, J., said, page 241:

> "The acts which a corporation may do are not necessarily separate franchises. Some of its business may be peculiar, and some of its powers may in themselves be franchises, which no one, whether an

> individual or a corporation, can exercise without state permission. On the other hand, most of its business is usually such as any one can do if he pleases, and as to such business a corporation stands precisely on the same footing with a private person."

Methodist Church of Newark v. *Clark,* 41 Mich. 730, opinion by Cooley, J., involved a dispute over church property, in which it became important to consider whether, by force of a certain statute, incorporation had been acquired by the *de facto* exercise of corporate franchises and privileges for ten years. In his opinion Judge Cooley said, page 736:

> "Before any act can be accepted and treated as the exercise of a corporate franchise or privilege, it must be made to appear that it is something which distinctly pertains to corporate powers; it must not be an act ambiguous in itself and which as properly belongs to a partnership or to an unincorporated association of persons."

Further on, at page 737, the learned judge observed:

> "Whatever may be the franchises and privileges of a corporation they must have this peculiarity, that they must be franchises and privileges that an unincorporated collection of people cannot possess or enjoy. In this case it is not shown that the religious body represented by the complainants has been in the possession or enjoyment of any such franchises or privileges. There has been a religious organization which has supported regular worship, debts have been contracted in its name, it has been represented in the annual conventions or conferences, it has received members to its communion and it has tried and expelled those accused of misconduct. But these are things which unincorporated religious societies have been accustomed to do from the foundation of the Christian Church to this day, and there is nothing in any one of them which can be regarded as an assertion of corporate existence or authority."

With equal logic it may be said that the conduct of a grocery business, with the sequestrated merchandise of the

former corporation-proprietor, cannot be regarded as the assertion of (or dependent upon) corporate existence or authority.

d.

The appointment of the respondent, as receiver of the property and assets of Worden Grocer Company, did not divest the latter of its franchises, nor did they *ipso facto* lapse. This seems to be the view of the petitioner (Brief, 16-17) as it clearly is that of the Michigan Supreme Court, expressed in the *Detroit Properties Corporation* case, *supra,* in a passage to be quoted presently.

We beg to repeat here the following portion of our argument in the court below:

> "When the 1926 tax upon the privilege fell due, the taxable privilege was still that of the corporation. In that respect, at least, we are in accord with the learned judge of the court below. Moreover, the attorney-general there took a position predicated upon the continuance of the privilege in the corporation. The property seized by the receiver under order of the appointing court did not include the corporation's privilege of functioning in Michigan as a corporation. It is true that the seizure denuded it of its entire capital and that the court's order forbade it to interfere with the receiver's operation and conduct of the business; but neither the seizure nor the restraining order transferred to the receiver, or destroyed, any one of the powers or privileges which were essentially characteristic of the corporate entity and which, together, constituted the corporate franchises. * * * We may add that possession of property and the freedom to use it are not distinctive attributes of a corporation. The loss of its property, or the freedom to enjoy it, may force it into inactivity but its 'privileges' endure, however empty they may be. And, be it remembered, the tax is upon the privilege, irrespective, as the legislature now says, of whether or not the corporation chooses actually to exercise it.
>
> Corporate inactivity, then, did not at once absolve Worden Grocer Company, itself, from the 1926 tax.

> The difficulty lay in the collection of it from a corporation whose property had been sequestrated for the primary benefit of its creditors. The same difficulty would confront the State in any case in which proceedings in bankruptcy had occurred; or if, without dissolution, a solvent corporation liquidated its assets, paid its creditors and distributed the surplus among its stockholders. Yet, no search of the Michigan statutes will reveal, we submit, any legislative intent to recover the privilege fee accruing against an inactive corporation by pursuit of assets the possession and control of which have passed from the corporation, whether by its voluntary act or as an incident to judicial proceeding against it."

In an early Massachusetts case, *Boston Glass Manufactory* v. *Langdon*, 24 Pick. 49, the court said:

> "The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect."

In 6 *Fletcher Cyc. Corp.* (1931), page 796, the author, with citation of authority, says, in speaking of the general franchise of a corporation:

> "It is distinct from capital, tangible property and assets, and it is not terminated by an attempted conveyance of all tangible property of the corporation, since it is not essential to the existence of a corporation that it should possess any property."

Compare *In re G. H. Hammond Co.*, 246 Mich. 179, 182, holding subject to the privilege tax a Michigan corporation without property or business in the state; and also the provision of Section 5 of the Corporation Fee Act (p. 4, *supra*) which bases the tax upon paid-in capital and surplus, without diminution for capital impairment.

The court below took the view, in harmony with the foregoing considerations, that the corporation itself might

continue liable for the tax until dissolution (R., 35); and although the court observed that independent corporate liability would be immaterial unless there proved to be a surplus distributable to stockholders, it made provision for the contingency in the order for remand (R., 39). Although the petitioner included this action in the specification of errors (Original Brief, 15), and in the statement of issues (Main Brief, 5), it is negligibly discussed in the argument. From this we conclude that counsel recognize that if the lower court was correct upon the main issue, no detriment to the petitioner could result from the court's order for payment out of surplus assets.

e.

The theory adopted by the state court in the *Detroit Properties Corporation* case, but rejected by the lower court, that the managing receiver of a mercantile corporation partially derives his powers from the franchise of the corporation, is unsound.

The state court, in its opinion, said:

> "On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise 'to do' passes to the control of the court. *Detroit, etc. R. Co.* v. *Campbell,* 140 Mich. 384; *Grand Rapids Trust Co.* v. *Carpenter,* 229 Mich. 491; *United States* v. *Whitridge, supra.*"

While two of the cases cited by the state court support the first sentence of the quoted passage, none of them can be said to hold that the functional powers of the corporation, in case of receivership, passed to the custody or control of the court.

Detroit, etc. R. Co. v. *Campbell, supra,* merely held that a receivership of a railroad corporation does not divest it of its franchise so as to invalidate condemnation proceedings commenced in its name by another than the receiver pursuant to previous contract.

Grand Rapids Trust Company v. *Carpenter, supra,* held that after appointment of a receiver of corporate property, a mortgage thereon executed by corporate trustees in violation of the court's injunction was void. Manifestly, the power of the court to enjoin corporate action in no way warrants the conclusion that the court has taken over the corporate franchises for use by its receiver.

United States v. *Whitridge, supra,* certainly does not sustain the proposition that the corporate powers passed to the receiver. It is true that in his opinion in that case, Mr. Justice Pitney, in the passage quoted on page 42 of the petitioner's main brief, said that all of the franchises except the primary franchise to be a corporation had passed to the receivers; but the language immediately following, read in the light of the fact that the corporations in that case were street railway corporations, clearly indicates that the court was alluding to their special franchises imposing duties to the public. These franchises, and their duties, passed into the hands of the receivers. But to say that the court held that the corporate powers to act and do business passed to the receivers, or that the latter derived their capacity to carry on the business from those corporate powers is clearly unwarranted by the language of the court in the cited case.

We call attention to the Michigan statute quoted on page 5, *supra,* relating to voluntary dissolution of corporations by proceedings in chancery. The provision for appointment of a receiver upon entry of the decree dissolving the corporation is very old. The provision empowering the receiver to continue the business of the corporation for a limited period after dissolution was added by amendment in 1905. That the decree of dissolution definitely terminated the corporate existence was held at an early date:

Cady v. *Knit Goods Mfg. Co.,* 48 Mich. 133.

After the amendment, the Michigan Supreme Court reaffirmed this view by holding that another statute, which

provides for an extension of corporate existence for a period of three years after dissolution, for winding-up purposes, did not apply where dissolution had been decreed in chancery proceedings, and a receiver appointed.

Jacobs v. *E. Bement's Sons,* 161 Mich. 415, 419.

In view of these two decisions, it is clear that a receiver of a Michigan corporation appointed in dissolution proceedings and vested by statute with power to conduct the business can not be said to derive any of these powers from the corporate franchises, for they are gone. That such a receiver cannot effectively operate the corporate business will hardly be contended. If he does not require the corporate franchises, no more did the respondent, as receiver of a grocery corporation, depend upon its corporate franchise for authority or capacity to conduct the business.

I.

The court below was correct in holding that the receiver did not exercise the taxable privileges of the corporation and in holding applicable to the case the rationale of the decision of this court in *United States* v. *Whitridge,* 231 U. S. 144.

The legal capacity of the respondent to act at all it obviously derived from its own corporate organization as a trust company. Every power it possessed in its capacity as receiver it derived, not from Worden Grocer Company or the corporate franchises thereof, but from the appointing court. It took over and managed the property not by sufferance of the corporate owner thereof but by authority and as officer of the court. The grocery business which the respondent operated as receiver was not an enterprise, the lawful conduct of which was dependent upon any corporate franchise conferred upon Worden Grocer Company by the State of Michigan. Whether the respondent, as receiver, was limited to the field of business activity marked out by the corporate purposes of Worden Grocer Company

is immaterial, for the reason that the case at bar does not involve any question of transgression by the receiver. Moreover, even if, contrary to the view of the lower court, it is the purpose clause of corporation articles which limits a receiver, *non sequitur* that the receiver, when acting within the permissible area, derives his capacity to act from the charter. The maintenance of the corporate status of Worden Grocer Company was in no way indispensable to the administration of the receivership or a matter of solicitude to the receiver. Under the decision in *Motor City Engineering Co.* v. *Fred E. Holmes Co.*, 241 Mich. 446, it is certain that the corporate powers of Worden Grocer Company were in suspension from and after September 10, 1926, yet that fact did not constitute the slight handicap to the receivership for the plain reason that the receiver was not utilizing the franchise of the corporation.

We say the court below was sound in holding *United States* v. *Whitridge, supra,* to be controlling in principle.

The answer to our argument in reliance upon that case in the court below, and the answer of the Michigan Supreme Court to a like argument before it, was that in the *Whitridge* case the tax was held to be upon the act of doing business by the corporation itself. This view of that decision is undoubtedly encouraged by the fact that one of its bases was the construction placed upon the language of the Federal Corporation Tax Law of 1909, in effect excluding receivers from the operation of the statute. It can not be correctly said, however, that the corporation excise tax imposed by the Act of 1909 was a tax upon the doing of business and not upon the franchises. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the decision of this court upholding the constitutionality of the Act of 1909 against every conceivable sort of attack, the court repeatedly said, in meeting the charge that the statute was void for lack of uniformity, that the tax was a levy upon the privilege of doing business in corporate form. Cf. 220 U. S. 107, 151, 155, 165, 166.

In view of this authentic characterization of the Act of 1909, we think the effort to distinguish the *Whitridge* case

is vain. Leaving aside matters of statutory construction, that case clearly held that the receivers were not conducting the business by means of the primary corporate franchise. We think the decision shows that this court did not accept the view that the so-called franchise 'to do' passed to the receivers; for obviously the only possible significance of such a transfer of corporate capacity would be to supply the receivers with a power which the appointing court could not give them. But that the receivers in the *Whitridge* case were to be regarded as drawing from the corporation, through its franchise, any of the powers requisite to conduct the business is explicitly denied by the court. Hence, we say that in holding in the *Whitridge* case that the thing taxed, namely the privilege of doing business in corporate form, was not exercised by a corporation's receivers and that therefore they were not subject to the tax, this court did more than merely to construe the act as not extending to corporate receivers; and that this court, in truth, took a position upon a fundamental question of corporation law: the nature of the general corporate franchise and the relation of a corporate receiver thereto.

The Michigan Supreme Court is not persuasive when, in the *Detroit Properties Corporation* case, it seeks to distinguish the *Whitridge* case on the ground "that the ruling was a special construction of a special law with a special background and purpose and was not founded upon, and did not establish, general principles applicable to other laws." We think it plain that this court, in the *Whitridge* case, did more than construe the Act of 1909. Moreover, if that statute was a 'special' law with a 'special' background, we suggest that the same might be said of every state corporation franchise tax statute involved in the many cases relied upon by the petitioner and by the state court in its decision. No fine distinctions between the Act of 1909 and the Michigan Corporation Fee Act can vitiate the applicability of the principle underlying the decision in *United States* v. *Whitridge*. If the receivers' operation of the

railroads, involved in that case, was not a corporate doing of business within the meaning of the Act of 1909, then, for the same reasons, the respondent's conduct of the grocery business involved in the case at bar was not an exercise of the corporate franchises within the meaning of the Michigan Corporation Fee Act.

g.

Other decisions of this court in principle support the exemption of the respondent, as receiver, from a purely implied tax liability.

United States v. *Wigglesworth,* 2 Story, 369, 373;
Eidman v. *Martinez,* 184 U. S. 578;
Gould v. *Gould,* 245 U. S. 151, 153;
Crooks v. *Harrelson,* 282 U. S. 55, 60, 61;
Smietanka v. *First Trust and Savings Bank,* 257 U. S. 602;
Reinecke v. *Gardner,* 277 U. S. 239.

In the *Smietanka* case, *supra,* this court declined to extend, by implication, the provisions of the Income Tax Act of 1913, to reach income held and accumulated by a trustee for unborn beneficiaries.

In the *Reinecke* case, *supra,* this court held that a trustee in bankruptcy of a domestic corporation was not subject to an excess profits tax on profits earned during the operation of the business of the bankrupt, although the profits would have been taxable if earned by the corporation. In the opinion the court referred to *United States* v. *Whitridge, supra,* and also to *Scott* v. *Western Pac. Railway,* 246 Fed. 545 (C. C. A. 9). The latter case, arising under the income tax provisions of the Act of October 3, 1913, which did not mention receivers, held that a corporate receiver was not subject to a tax upon the corporate income in his hands.

4.

In our argument we have aimed to confine the discussion to the basic principles involved, and have purposely refrained from examining, case by case, the petitioner's cited authorities, practically all of which were discussed with accuracy and discrimination by the court below in its opinion. It remains, however, to touch upon a number of irrelevant or confusing matters in the petitioner's brief, to which we refer by page number.

a.

Section 65 of the Judicial Code, quoted on pages 32-33 of the petitioner's brief (but erroneously cited as Section 124) has no application. Whether the tax is a valid obligation of the respondent, as a federal court receiver, is the question to be decided. It cannot be presupposed.

In re Tyler, 149 U. S. 164;
In re Swan, 150 U. S. 637;
First Nat. Bank v. *Ewing,* 103 Fed. 168 (C. C. A. 5); writ of certiorari denied, 179 U. S. 686.

b.

On pages 14 and 38-40 of their brief counsel show manifest misunderstanding of the views of the lower court respecting those cases in which the receiver of a public utility corporation has been held liable for franchise taxes. Such cases might be justified, observed the court, on the ground that the receiver of a utility, in a very accurate sense, uses the so-called franchise "to do" formerly exercised by the corporation. The application which the learned judge made of this observation was simply that some courts had fallaciously applied to receivers of mercantile corporations a rule of liability justifiable only in cases where the receiver, to operate the business, must perforce exercise special franchise privileges. The court's opinion is sufficiently clear (R., 35-36).

Nevertheless counsel, in a wholly unwarranted manner, attribute to the lower court the view that the word "franchises", in the statute, is to be limited to special rights and privileges granted to public utilities (Brief, 14); and again further on (Brief, 38-39), counsel indulge in the baseless assumption that the language of the statute was somehow involved in or abused by the reasoning of the court above-referred to. In truth, however, the lower court did not remotely suggest that the statute makes any distinction between the classes of corporations which are within its scope. Neither did the court remotely suggest that under the statute "the franchise, the privilege of exercising which is taxed, is such a franchise as is granted to a public utility." (Brief, 40). The implication that the lower court placed its own interpretation upon the statute is false, as we have previously shown. It did not question the state court's definition of the nature or subject of the tax. It held that the receiver did not use the thing taxed.

c.

The argument (Brief, 31) that the lower court should be reversed lest a corporation in the hands of a federal court receiver escape the tax, while a corporation in the hands of a state court receiver would be required to pay the same, does not warant extending to this respondent, by implication, a tax lacking solid legal justification. The legislative power of the State to impose an excise tax upon business conducted by federal court receivers has not been drawn in question in this case.

d.

The assertion (Brief, 32) that the court below did not give weight or consideration to *Re G. H. Hammond Co.*, 246 Mich. 179, 182, is misleading, because the court expressly recognized that the corporation itself might continue liable, regardless of business inactivity (R., 35). Moreover, the case cited is irrelevant to any substantial issue in the case at bar.

e.

In making the reserve argument (Brief, 43-47) that the tax is payable, whether or not the receiver used the franchises, counsel part company with the Michigan Supreme Court (which, in the *Detroit Properties Corporation* case, applied, as the test, the use of the franchises), and encounter the case of *State of Ohio* v. *Harris, supra*, still the law of the Sixth Circuit, in which the court rejected the 'continued existence' test of liability.

f.

The contention (Brief, 50) that the decision below deprives the State of Michigan of "its prior lien for the payment of this tax" begs the question, and adds nothing to the argument. Until favorable adjudication of the State's right to the tax, there is no lien of which to be deprived.

VI.

Conclusion.

In our argument we have striven, by a discussion mainly dealing with the basic questions in the case, to show reason for our faith in the soundness of the decision under review. Minute examination of the precedents cited by the petitioner, beyond their analysis by the court below, would profit little if we are correct in the belief that a proper decision of the case calls for a return to first principles. Numerically considered, and if they must be accepted unquestioningly, the hostile rulings, in courts of inferior jurisdiction, are somewhat formidable. Most of them, as shown by the opinion of the court below, yield to logical differentiation; and the few which do not thus yield appear to us to reveal, as expressed by the learned judge who wrote the opinion, "the result of blindly following an apparent mass of precedent (often inaccurately thought out

and expressed) without careful analysis of the facts of such cases, or a determination of the soundness of reason underlying the decision in each'' (R., 37).

That this court is not precluded, by the state court decision, from rendering independent judgment upon the substantial issue, we have tried to show; and upon that issue we have striven to demonstrate that the judgment under review was based upon sound principles of law and was in harmony with logically applicable decisions of this court. We therefore pray that, in affirmance of the judgment below, the writ be dismissed,

Respectfully submitted,

BENJAMIN P. MERRICK,
Counsel for Respondent.

April 8, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 598.—October Term, 1931.

People of the State of Michigan, by John S. Haggerty, Secretary of State, Petitioners, *vs.* Michigan Trust Company, Receiver of Worden Grocer Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 16, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

A petition by the People of the State of Michigan that a receiver appointed by a federal court be directed to pay out of the moneys in his hands corporate franchise taxes due or claimed to be due to the People of the State was granted by the District Court, and denied by the Court of Appeals. 52 F. (2d) 842. The case is here on certiorari.

At the suit of a simple contract creditor, a receiver of the property of the Worden Grocer Company, a Michigan corporation, engaged in business at its domicile, was appointed by a Federal District Court in Michigan on February 9, 1926. The bill of complaint alleged that the defendant was solvent, and that if its business was handled by a receiver free from interference by its creditors, it would be able to pay its debts in full and would have a surplus available for preferred and common stockholders. On the same day the directors of the defendant adopted a resolution consenting to the receivership; and an answer admitting the allegations of the bill of complaint and consenting to the relief prayed for was filed forthwith. Thereupon, and still on the same day, the court made an order appointing the Michigan Trust Company receiver of the defendant and of all its assets with authority "to carry on the business now carried on by the Worden Grocer Company, and to operate and manage its property and business in such manner as will, in the judgment of said Receiver, produce

the most satisfactory results." To that end authority was granted "to pay the current and unpaid payrolls of said defendant; to incur such obligations and indebtedness, . . . the same to be prior to the present unsecured obligation" of the defendant, . . . "as to the Receiver may seem necessary for continuance of the business," and in particular "to pay all taxes and assessments levied upon the property and assets of said company," as well as all rentals accrued or to accrue thereafter.

The receiver so appointed carried on the business thus committed to its charge. It continued to do this till December 30, 1929, when the court made an order confirming a sale of all the mercantile assets, as a result of which sale there was paid to the common creditors a dividend of 25%. Cash and unsold real estate are still in the receiver's custody.

In February, 1930, the People of the State filed in the District Court a petition that the receiver be directed to pay the corporate taxes or privilege fees for the years 1925 to 1929 inclusive, amounting in the aggregate to $10,988.36. The liability of the receiver in respect of such fees or taxes is the subject of this controversy. The District Court held that they were charges upon the assets prior to the claims of creditors in that they were expenses necessarily incurred by the receiver in fulfilling the duty to operate the business. The Court of Appeals held that they were liabilities due to the People of the State, but liabilities not to be discharged until the claims of all other creditors as well as the expenses of the receivership had been satisfied in full.

By a statute of Michigan enacted in 1923 (Act No. 233, Public Acts 1923, sec. 4), "every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by Section 7 hereof, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state, an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars."

There were amendments of the statute in 1927 and 1929 (Act No. 140, Public Acts 1927; Act No. 175, Public Acts 1929), but

their significance in relation to this controversy is not important enough to make it necessary to quote them.

The tax is laid upon the corporation "for the privilege of exercising its franchise and of transacting its business within this state." Whether a corporation does exercise its franchise or transact its business within the meaning of a statute so framed when it does business through a receiver is a subject on which much subtle argument has been expended by state and federal courts. Distinctions have been drawn between receivers appointed to carry on the business of a corporation with a view to the continuance of its corporate life, and receivers appointed in aid of the dissolution of the corporation or the liquidation of its business. See *e. g., Collector of Taxes* v. *Railway,* 234 Mass. 336; *State of Ohio* v. *Harris,* 229 Fed. 892, 901. Other distinctions have been drawn between taxes on a franchise to exist as a corporation and a franchise for transacting business, or, as many of the cases put it, between a franchise to "be" and a franchise to "do". See *e. g., Cobbs & Mitchell Corp.* v. *Tax Appeal Board,* 252 Mich. 478, 481. Even where the tax is on a franchise to "do", there is wide diversity of judgment. The wording of some statutes has been read by some courts as importing the doing of business in the usual course by agents and officers appointed in the usual way. *United States* v. *Whitridge,* 231 U. S. 144, 149. Wording only slightly different has been thought by other courts to include the operations of a business conducted by receivers. *Central Trust Co.* v. *N. Y. C. etc. R. R. Co.,* 110 N. Y. 250; *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512; *Re U. S. Car Co.,* 60 N. J. Eq. 514; *Armstrong* v. *Emmerson,* 300 Ill. 54; *People* v. *Hopkins,* 18 F. (2d) 731. Other wording not unlike has been held to import the imposition of a burden on the mere privilege to "do", though no business was in fact transacted by the directors or by any one (In re *G. H. Hammond Co.,* 246 Mich. 179; *New York* v. *Jersawit,* 263 U. S. 493, 495), a construction whereby the tax on the privilege to do becomes closely assimilated, in respect of domestic corporations, to one on the privilege to be. *In re G. H. Hammond Co., supra.*

We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and

as to that the courts of the State, if they have spoken, pronounce the final word. The decision of the Supreme Court of Michigan in *Re Detroit Properties Corporation,* 254 Mich. 523, is a controlling adjudication as to the meaning and application of the privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to "do"; that this privilege existed though nothing was ever done; that the order appointing a receiver to continue the business did not divest the privilege; that the only effect of such an order was to nominate the person who was to exercise the "powers belonging to the corporation by legislative grant;" and hence that within the meaning of the statute the corporation retained a "privilege of exercising its franchise and of transacting its business", for which a tax was due. Cf. *Central Trust Co.* v. *N. Y. C. etc. R. R. Co., supra; State of Ohio* v. *Railway, supra; People* v. *Hopkins, supra; In re G. H. Hammond Co., supra.* The significance of this decision is not avoided by the suggestion that the court in determining the application of the tax was guided by general principles as to the effect of a receivership, and not by any provision expressly covering receiverships in the body of the statute. This does not detract from the quality of the judgment as an expression of the local law. Problems of statutory construction do not arise unless the meaning of a statute is obscure or uncertain in its relation to a set of facts, and obscurities or uncertainties thus arising are not susceptible of settlement unless the words of the statute are read in a setting of common law implications, a background of common law doctrine, giving meaning and perspective to a vague and imperfect outline. *Ward* v. *Erie R. R. Co.,* 230 N. Y. 230, 234; *Murray* v. *Chicago & N. W. Ry. Co.,* 62 Fed. 24, 31; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 654; *Rice* v. *Minn. R. Co.,* 1 Black 358, 374, 375. The Supreme Court of Michigan in deciding the *Detroit Properties* case had to make answer to the question whether the legislature of the State in imposing a tax upon the privilege of exercising a franchise intended to reach a situation where the business of the corporation was conducted through the arm of a receiver. The tax, if there was any, could have no origin independent of the provisions of the statute, and any decision upholding or annulling it is one involving inescapably a construction of the statute. Cf. *New York* v. *Jersawit,* 263 U. S. 493, 495; *Mason* v.

United States, 260 U. S. 545, 555, 556; *Quong Ham Wah Co.* v. *Industrial Comm.,* 255 U. S. 445, 448; *Poe* v. *Sanborn,* 282 U. S. 101, 110.

We hold, therefore, in submission to the local law, that the corporation, the Worden Grocer Company, was still subject to the tax though it was in the hands of a receiver. The decision of the court below apparently concedes as much, but maintains that the tax must be paid by the corporation and not by the receiver, with the result that the State is subordinated to all the other creditors. We find no warrant for the discrimination either in the provisions of any statute or in any principle of equity governing the distribution of a fund in the hands of a receiver. On the contrary, statute and doctrine point the other way.

Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors. They are so treated in the order by which the receiver was appointed. By the order the receiver is directed in continuing the business to pay taxes and rentals and any other expenses necessary to enable the business to go on, and to give such payments priority over other debts and obligations. These privilege fees were charges of the nature there described. Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security. *Coy* v. *Title Guarantee & Trust Co.,* 220 Fed. 90, 92. The privilege fees, being taxes, were expenses of administration within the very terms of the order, but in addition they were taxes of such an order that the corporation by failing to pay them became subject, if the State so elected, to a forfeiture of its franchise. Act No. 172, Public Acts 1923, sec. 7; cf. *Turner* v. *Western Hydro-Electric Co.,* 241 Mich. 6. The receiver was under a duty to pay them when they accrued, and having failed to fulfill that duty then, it should be compelled to pay them now. The decisions as to this are persuasive and uniform. *Coy* v. *Title Guarantee & Trust Co., supra; Bright* v. *Arkansas,* 249 Fed. 950; *McFarland* v. *Hurley,* 286 Fed. 365; *People* v. *Hopkins,* 18 F. (2d) 731, 733; cf. *In re Tyler,* 149 U. S. 164, 182.

If the receivership were to be viewed as equivalent to one for the liquidation of the business, the result would not be different, and this for the reason, without considering any other, that it was not such a receivership when the suit was instituted. It was then, as we have pointed out, a receivership for the conservation of the assets of a corporation believed to be completely solvent. If it ever lost its original quality and became a winding up receivership, the change was not earlier than the sale of the mercantile assets in the latter part of 1929. Claims of the State for taxes then accrued, instead of being postponed to those of other creditors, are entitled to a preference by the provisions of the local law. Sections 15315 and 15362, Compiled Laws of Michigan.

This court has had occasion to point out the abuses that can arise from friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay, *Harkin* v. *Brundage*, 276 U. S. 36, 52, 54; cf. *Kingsport Press* v. *Brief English Systems*, 54 F. (2d) 497, 499, 500. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes lest their function be perverted. For four years the business of this corporation was carried on in Michigan by a chancery receiver in the hope that winding up and dissolution would thereby be averted. There should be no shift of the theory of the suit in these, its expiring moments. To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the State and a reproach to equity.

A word in conclusion should be said as to *United States* v. *Whitridge, supra.* The court held in that case that a corporation operating through a receiver is not subject to a federal tax imposed as an excise on the actual doing of business and to be measured by its fruits. The tax in controversy is a State tax, and is laid not on the doing of business, but on the mere privilege to do it. The State decision as to its meaning would control in case of conflict, but conflict there is none.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Mr. Justice McReynolds is of opinion that the decree of the Circuit Court of Appeals should be affirmed.